SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

vs.

JOSEPH NIEROTKO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Eastern District of Michigan	1	1
Complaint	1	1
Answer	3	2
Record of proceedings before Social Security Board	5	4
Certification of Board	5	4
Copy of letter dated November 30, 1943, to Mr. Morton A. Eden, attorney-at-law, from Joseph E. McElvain, chairman, Appeals Council, enclosing copy of extension notice	7	6
Copy of notice of extension of time within which to file a civil action	8	6
Copy of letter from Morton A. Eden dated November 26, 1943, to Mr. Joseph E. McElvain, chairman, Appeals Council, requesting an extension of time within which to file a civil action	9	7
Copy of letter to claimant enclosing copy of decision of Appeals Council	10	7
Copy of decision of Appeals Council	11	8
Copy of letter to claimant granting request for review of referee's decision	12	9
Copy of request for review of referee's decision	12	9
Copy of letter from referee to claimant enclosing copy of referee's decision	13	10
Copy of decision of referee	14	11
Copy of notice of hearing	29	22
Copy of appointment of representative	30	22

	Original	Print
Record from D. C. U. S., Eastern District of Michigan—Con.		
Answer—Continued		
Record of proceedings, etc.—Continued		
Copy of request for hearing	32	24
Copy of transcript of hearing held on April 19, 1943	33	24
Opening statement of Referee	34	25
Testimony of Joseph Nierotko	37	27
Statement by Mr. Eden	39	29
Exhibits:		
A Form OAR–7008 dated November 3, 1942, signed by Joseph Nierotko	40–A	30
B Copy of letter dated February 27, 1943 to Joseph Nierotko from the Social Security Board in regard to wages credited to his account	41	32
C Report of contact dated April 19, 1943 made by a representative of the Social Security Board, after interviewing the Chief of the Employment Tax Division, Bureau of Internal Revenue, in regard to taxes paid on Joseph Nierotko's wages	42	33
D Letter from the Ford Motor Company addressed to the manager of the Dearborn, Michigan, field office, dated April 29, 1943	43	34
Notice of hearing on motion for summary judgment	46	36
Motion for summary judgment	47	36
Order granting defendant's motion for summary judgment on the pleadings	47	37
Notice of Appeal to Circuit Court of Appeals	48	37
Proof of mailing of notice of appeal	49	38
Stipulation as to contents of record on appeal	49	38
Order extending time within which to file and docket record on appeal	50	39
Stipulation extending time	51	39
Clerk's certificate [omitted in printing]	52	40
Proceedings in U. S. C. C. A., Sixth Circuit	53	40
Minute entry of argument and submission	53	40
Judgment	53	40
Opinion, Simons, J	54	41
Clerk's certificate [omitted in printing]	62	48
Order allowing certiorari	63	48

1 In the District Court of the United States for the Eastern District of Michigan, Southern Division

Civil Action No. 4064

JOSEPH NIEROTKO, PLAINTIFF

v.

THE SOCIAL SECURITY BOARD, AN AGENCY OF THE UNITED STATES DEFENDANT

Complaint

Filed January 14, 1944

Plaintiff says:

I

Plaintiff resides at 5751 St. Aubin, Detroit, Wayne County, Michigan, and within the jurisdiction of this court.

II

This proceeding is brought to review the decision of the appeals council of the Social Security Board entered June 17, 1943, in case No. S–217 entitled "In the case of Joseph Nierotko, Claimant; Joseph Nierotko, Wage Earner; Social Security Account No. 385–10–5766; Claim for Additional Wage Credits."

III

Jurisdiction to review said decision is conferred by 9A, F. C. A., Title 42, Section 42 (g), said section being Section 205 (g) of the Social Security Act, Amendments of 1940. That in accordance with said provisions the Social Security Board has extended the time within which to bring this action to January 15, 1944.

2 IV

The Ford Motor Company paid to the plaintiff the amount of $3,501.32 representing back pay due plaintiff for the period from February 2, 1937, to September 25, 1939, during which time he was discriminated against by the Ford Motor Company for union activities in violation of the National Labor Relations Act.

V

That said payment was made pursuant to the order of the National Labor Relations Board in the case entitled "In the Matter

of Ford Motor Company and International Union, United Automobile Workers of America" (14 N. L. R. B. 346). The United States Circuit Court of Appeals for the Sixth Circuit entered a decree on October 8, 1940, enforcing the foregoing order "in the case of National Labor Relations Board v. Ford Motor Company" 114 F. 2d 905). Petition for certiorari was denied by the United States Supreme Court on February 10, 1941 (312 U. S. 689). Said order requiring back pay was made pursuant to Section 10 (c) of the National Labor Relations Act. Said order and decision are hereby incorporated by reference.

VI

Defendant refuses to credit said payment to plantiff's Social Security Account as wages in accordance with the provisions of the Social Security Act because it holds that said amount does not constitute wages as defined in Section 210 (a) of the Social Security Act, 9A F. C. A., Title 42, Section 410 (a).

VII

The sole question in dispute and of which review is sought is whether said amount received pursuant to the provisions of the National Labor Relations Act constitutes wages.

Wherefore, plaintiff prays that this Court reverse the de-
3 cision of the Social Security Board and enter a judgment that plaintiff is entitled to have credited to his social security account the additional amount of $3,501.32 as wages in accordance with the provision of the Social Security Act.

MORTON A. EDEN,
One of the Attorneys for Plaintiff.

ERNEST GOODMAN and MORTON A. EDEN,
Attorneys for Plaintiff,
3220 Barlum Tower, Detroit 26, Michigan.

In United States District Court

Answer

Filed March 14, 1944

Now comes the Social Security Board, an Agency of the United States, defendant herein, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Arnold W. Lunger-

hausen, Assistant United States Attorney for said district, its attorneys, and answers the complaint herein as follows:

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted, as is shown by the attached certified copy of the transcript of the entire record of the proceedings relating to the claim, including the plaintiff's request for a statement of the amount of wages credited to his old age and survivor's insurance account, testimony and evidence upon which the decision of the Appeals Council of the Social Security Board here complained of was based.

4 SECOND DEFENSE

2. The plaintiff is not entitled to a credit to his Social Security account, under the provisions of the Social Security Act, on the sum of $3,501.32, paid him by the Ford Motor Company on July 18, 1941, pursuant to the order of the National Labor Relations Board in the case entitled, "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," because said amount did not constitute "wages" as defined in Section 210 (a) of the Social Security Act (42 U. S. C. 410 (a)).

THIRD DEFENSE

3. The defendant admits the allegations contained in paragraphs 1, 2, and 3 of the complaint.

4. The defendant, in answer to paragraph 4 of the complaint, admits only that Ford Motor Company paid to the plaintiff the amount of $3,501.32, pursuant to the order of the National Labor Relations Board, as hereinafter set forth.

5. The defendant admits that the said payment was made pursuant to the order of the National Labor Relations Board in the case entitled, "In the matter of Ford Motor Company and International Union, United Automobile Workers of America" (14 N. L. R. B.), and that the United States Circuit Court of Appeals for the Sixth Circuit entered a decree on October 8, 1940, enforcing the foregoing order in the case of "National Labor Relations Board v. Ford Motor Company" (114 F. (2d) 905), and that petition for certiorari was denied by the United States Supreme Court on February 10, 1942 (312 U. S. 689).

6. The defendant admits the allegation contained in paragraph 6 of the complaint.

7. The defendant admits that the sole question in dispute is whether the amount received by the plaintiff pursuant to
5 the National Labor Relations Board constitutes wages within the meaning of the Social Security Act.

FOURTH DEFENSE

8. The defendant, in accordance with Section 205 (g) of the Social Security Act Amendments of 1939, files herewith as a part of its answer a certified copy of the transcript of the proceedings had before the Appeals Council of the Board in Case Number 5–217 entitled, "In the Case of Joseph Nierotko, Claimant; Joseph Nierotko, Wage Earner; Social Security Account No. 385–10–5766; Claim for Additional Wage Credits," including the evidence upon which the decision complained of is based.

Wherefore, the defendant prays for a judgment dismissing the complaint and for a judgment in accordance with Title II, Section 205 (g) of the Social Security Act Amendments of 1939, (42 U. S. C, Section 405 (g)), affirming the decision of the Board herein complained of, and for such other relief as may be appropriate.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant.

Certification of the Social Security Board

The Social Security Board, of the Federal Security Agency, by its duly authorized official Joseph E. McElvain, Chairman, Appeals Council, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Joseph Nierotko for additional wage credits under Title II of the Social Security Act, such transcript including claimant's request for a statement of the amount of wages credited to his Old-Age and Survivors Insurance ac-
6 count, testimony, and evidence upon which the decision of the Appeals Council of the Social Security Board was based.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of letter dated November 30, 1943, to Mr. Morton A. Eden, Attorney-at-Law, from Joseph E. McElvain, Chairman, Appeals Council, enclosing copy of Extension notice.

(2) Copy of notice of Extension of Time Within Which to File a Civil Action.

(3) Copy of letter from Morton A. Eden dated November 26, 1943, to Mr. Joseph E. McElvain, Chairman, Appeals Council, requesting an extension of time within which to file a civil action.

(4) Copy of letter to claimant enclosing copy of decision of Appeals Council.

(5) Copy of decision of Appeals Council.

(6) Copy of letter to claimant granting request for review of referee's decision.

(7) Copy of Request for Review of Referee's Decision.

(8) Copy of letter from referee to claimant enclosing copy of referee's decision.

(9) Copy of decision of referee.

(10) Copy of Notice of Hearing.

(11) Copy of Appointment of Representative.

(12) Copy of Request for Hearing.

(13) Copy of transcript of hearing held on April 19, 1943.

The following documents are attached to the above-mentioned transcript as exhibits introduced in evidence before the referee:

(14) Copy of Form OAR–7008 dated November 3, 1942, signed by Joseph Nierotko (Exhibit A).

7 (15) Copy of letter dated February 27, 1943, to Joseph Nierotko from the Social Security Board in regard to wages credited to his account (Exhibit B).

(16) Copy of Report of Contact dated April 19, 1943, made by a representative of the Social Security Board, after interviewing the Chief of the Employment Tax Division, Bureau of Internal Revenue, in Regard to taxes paid on Joseph Nierotko's wages (Exhibit C).

(17) Copy of letter dated April 29, 1943, from the Ford Motor Company directed to the manager of the Social Security Board Field Office at Dearborn, Michigan (Exhibit D).

In testimony whereof, Joseph E. McElvain, Chairman of the Appeals Council, pursuant to authority conferred on him by the Social Security Board, has hereunto set his hand and affixed the seal of the Social Security Board in the City of Washington, District of Columbia, this 1st day of March 1944.

[SEAL]

JOSEPH E. MCELVAIN,
Chairman, Appeals Council,
Social Security Board.

09:AC

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

NOVEMBER 30, 1943.

IN THE CASE OF JOSEPH NIEROTKO, CLAIMANT; JOSEPH NIEROTKO, WAGE EARNER; SOCIAL SECURITY ACCOUNT NO. 385-10-5766

MR. MORTON A. EDEN,
Attorney-at-Law,
Barlum Tower, Detroit 26, Michigan.

DEAR MR. EDEN: Pursuant to the request contained in your letter of November 26, 1943, the time within which to file a civil action in the above case is hereby extended to January 15, 1944. Enclosed is a copy of the Extension notice.

Sincerely yours,

JOSEPH E. MCELVAIN,
Chairman, Appeals Council.

Enclosure
msm/msm
cc—Referee Raymond, Mgr. F. O. Detroit, Michigan, Claimant.

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Extension of time within which to file a civil action

Case No. 5-217

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT); JOSEPH NIEROTKO; (WAGE EARNER); 385-10-5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

It appearing that the claimant will require additional time within which to bring a civil action for the purpose of reviewing the Appeals Council's decision, rendered on June 17, 1943, the time within which to bring a civil action is hereby extended to January 15, 1944.

APPEALS COUNCIL, SOCIAL SECURITY BOARD,
JOSEPH E. MCELVAIN, *Chairman.*

Dated November 30, 1943.

9

LAW OFFICES

MAURICE SUGAR

Barlum Tower

DETROIT 26, MICH.

Re: In the case of Joseph Nierotko, Claimant and Wage Earner; Social Security Acct. 385-10-5766

Mr. JOSEPH E. MCELVAIN,
Chairman, Appeals Council, Social Security Board,
1825 H Street NW., Washington, D. C.

DEAR SIR: In accordance with your letter of July 16, 1943, and our telephone conversation of several days ago, we hereby request an extension of time within which to bring a civil action to review the decision of the Appeals Council in the above case.

I would appreciate your prompt attention and your statement as to what date the extension is granted. Naturally we would prefer the extension to be as late a date as possible, inasmuch as it may not prove necessary to appeal the case at all if we obtain a prompt decision in the Cwikiel case. However, if necessary, we will commence the action at once. In any event we do not wish to forego our right of appeal in the Nierotko case.

Very truly yours,

MORTON A. EDEN,

mae: mar.
uopwa26cio.

09: AC

10

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

JUNE 17, 1943.

IN THE CASE OF JOSEPH NIEROTKO, CLAIMANT AND WAGE EARNER;
SOCIAL SECURITY ACCOUNT NO. 385-10-5766

Mr. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit, Michigan.

DEAR MR. NIEROTKO: There is enclosed herewith a copy of the decision of the Appeals Council on your claim for additional wage credits. This decision affirms that of the referee which held that you are not entitled to additional wage credits since the $3,501.32 which you received as a result of a ruling by the National

Labor Relations Board did not constitute "wages" as the term is defined in the original Social Security Act.

It is believed that the conclusion reached is clearly explained in the decision of the referee. If, however, you have any question with respect to the enclosed decision, it is suggested that you contact the nearest field office of the Social Security Board.

If you disagree with the enclosed decision and desire a review of the same, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205 (g) of the Social Security Act Amendments of 1939.

Sincerely yours,

JOSEPH E. MCELVAIN,
Chairman, Appeals Council.

jos: jos.

cc—Referee Raymond, F. O. Mgr., 510 Lafayette Bldg., Detroit, Mich. Morton A. Eden, Claimant's Representative.

11

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Decision of appeals council

Case No. 5-217

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT): JOSEPH NIEROTKO (WAGE EARNER): 385-10-5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

This case is before the Appeals Council upon request of Joseph Nierotko, the claimant, for review of the decision on his claim for additional wage credits which was rendered on May 13, 1943, by Lowell W. Raymond, Referee. The Appeals Council has given careful consideration to the claimant's contentions.

After thoroughly considering the entire record in this case, the referee's findings of fact and statement of reasons are hereby adopted and made a part hereof, and his decision is hereby affirmed.

APPEALS COUNCIL, SOCIAL SECURITY BOARD.
JOSEPH E. MCELVAIN, *Chairman.*

Dated June 17, 1943.

12 Form AC–520 (7–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Request for review of referee's decision

IN THE CASE OF JOSEPH NIEROTKO (NAME OF CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER'S NAME); 385–10–5766 (SOCIAL SECURITY ACCOUNT NUMBER)

CLAIM FOR ADDITIONAL WAGE CREDITS

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

JOSEPH NIEROTKO (Signature).

09: AC
Claim No. 385–10–5766

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

JUNE 11, 1943.

MR. JOSEPH NIEROTKO.
5751 St. Aubin, Detroit, Michigan.

DEAR MR. NIEROTKO: This acknowledges receipt of your request for review of the decision rendered by Mr. Lowell W.
13 Raymond, the Referee who conducted the hearing in your case. The Appeals Council grants your request for review.

If you wish to do so, you may appear before the Appeals Council, in Washington, in person or by a representative, or both, and you may also file with the Council a brief or other written statement of your contentions. If you decide to appear before the Appeals Council in person, or by a representative, please advise by letter within ten days so that we can notify you of the date when the Appeals Council will hear your argument. If you file a brief, it should be mailed to this office within fifteen days from the date

of this notice; one copy of your brief should be sent with the original.

The transcript of evidence (except the exhibits) taken at the hearing held by the referee is being forwarded today to the Field Office of the Social Security Board, located at 510 Lafayette Building, Detroit, Michigan, for your inspection. The decision of the Appeals Council will be based upon that record alone unless additional evidence is accepted. Such additional evidence, however, will not be accepted or considered by the Appeals Council unless there is a good showing before hand that it is material and may affect the Council's decision.

Very truly yours,

JOSEPH E. MCELVAIN,
Chairman, Appeals Council.

cc—Morton A. Eden, Claimant's Representative.
leg:bs.

09:RO:V
MAY 13, 1943.

Mr. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit, Michigan.

DEAR MR. NIEROTKO: There is attached my decision in your case to the effect that the $3,501.32 which you received as a result
14 of a ruling by the National Labor Relation Board did not constitute "wages" as that term is defined in the original Social Security Act.

It is believed that the conclusion reached is clearly explained in the decision. If, however, you have any question with respect to this decision it is suggested that you contact the manager of the Social Security Board field office located at 510 Lafayette Building, Detroit, Michigan.

If you disagree with this decision, either as to the findings of fact or the application of the law, you have the right to request a review thereof by the Appeals Council of the Social Security Board, Washington, D. C. Such request must, however, be made in writing and filed within thirty days from the date of this letter and can be filed at any Social Security office.

Yours very truly,

LOWELL W. RAYMOND, *Referee.*

cc: Detroit (Main) FO Morton A. Eden, Attorney.

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Referee's decision

Case No. 5–217

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER); 385–10–5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

In a written statement made November 3, 1942, Joseph Nierotko, herein known as the claimant, said that between January 1937 and March 1942, inclusive, he had received from the Ford Motor Company wages in the amount of $7,916.05; that $3,501.32 of it had been paid to him pursuant to a ruling by the National Labor Relations Board, and that this amount pertained to the period from sometime in 1937 (when he was discharged for union activities) until August 1939.

The Bureau of Old-Age and Survivors Insurance of the Social Security Board, hereinafter mentioned as the Bureau, gave the claimant credit for all the wages claimed in his statement of November 3, 1942 except the item of $3,501.32. The Bureau held that he was not entitled to wage credit for the $3,501.32 because that amount did not constitute "wages" as that term is defined in the Original Social Security Act, but that it was in the nature of damages; and on February 27, 1943 the Bureau sent the claimant a letter to that effect. On March 19, 1943 the claimant requested a hearing, contending that the $3,501.32 should be considered "wages" for social security purposes. Under the circumstances the only issue to be considered at the hearing was whether the $3,501.32 constituted "wages" within the meaning of that term as defined in the Original Social Security Act.

The hearing was held on April 19, 1943 in Room 631, Lafayette Building, Detroit, Michigan. The claimant appeared and testified and was represented by his attorney. The claimant appeared to be credible and cooperative, and an examination of all the evidence reveals the following:

On or about February 2, 1937, the Ford Motor Company, hereafter referred to as the company, discharged the claimant because of union activities; at that time the company removed him from the payroll and did not consider him an employee for any purpose from then until he was reinstated. The evidence indicates that between February 2, 1937 and on or about September 1939, when

he was reinstated as an employee of the company, the claimant did not work for anybody but lived on his savings and his wife's earnings.

The rights of the claimant and the rights of a number of
16 other discharged employees of the company, were considered by the National Labor Relations Board; and on August 9, 1939 this Board issued a "Decision and Order," commanding the company to

1. "Cease and desist from" doing several specific acts; and in addition, to

2. "Take the following affirmative action, which the Board finds will effectuate the policies of the Act."

(a) Offer reinstatement to twenty-four of the employees involved (including the claimant) "without prejudice to their seniority and other rights and privileges."

(b) "Make whole the persons named in paragraph 2 (a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each would have earned as wages during that period from the date of such discrimination against him to the date of the offer of reinstatement, less his net earnings during that period; deducting, however, from the amount otherwise due to each of the said employees, monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work-relief project. * * *." (Case C-199, Volume 14, Decisions and Orders of the National Labor Relations Board: In the matter of Ford Motor Company and International Union of United Automobile Workers of America.)

That part of the foregoing order requiring the company to reinstate and to "make whole" the twenty-four employees, was amended by the Circuit Court of Appeals for the Sixth Circuit, by striking from the list of twenty-four an employee named Emil Tomkow; but on December 5, 1940 this court issued an amended decree [original decree was dated October 8, 1940] commanding
enforcement of *that part* of the order as it applied to the
17 other twenty-three employees. (National Labor Relations Board vs. Ford Motor Company; 114 F. 2d. 905); and on February 10, 1941 the United States Supreme Court (312 U. S. 689) denied a petition in this case for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

As previously indicated the claimant was reinstated and returned to work for the company on or about September 1939; and in accordance with the order which had been issued by the National Labor Relations Board, and which had been enforced in part by the Circuit Court of Appeals for the Sixth Circuit, the

company paid the claimant "back pay" of $3,501.32. According to the company, the payment was made July 18, 1941 and covered the period from February 2, 1937 to September 25, 1939.

APPLICABLE LAW AND REGULATIONS

In determining whether the $3,501.32 constituted "wages" for social security purposes, one must apply the definitions of "wages" and "employment" as found in the Original Social Security Act and must be kept constantly in mind the fact that a person may be an employee for purposes of the National Labor Relations Act but at the same time not be an employee for the purposes of the Social Security Act.

Section 210 (a) of the Original Social Security Act (which governs the determination of "wages" for periods prior to 1940) provides that, "The term 'wages' means all remuneration for employment * * *."

Section 210 (b) of that Act (which governs the determination of "employment" for periods prior to 1940) defines "employment" as "any service, of whatever nature, performed * * * by an employee for his employer * * *." And to assist in administering Section 210 (b) *supra* the Social Security Board issued Article 2 of Regulations No. 2, which provides in part that "To constitute an employment, the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them." Therefore, the $3,501.32 cannot be considered "wages" for social security purposes unless the legal relationship of employer-employee existed between the claimant and the company during the period between the date of discharge and the date of the company's offer of reinstatement.

18

Article 3 of Regulations No. 2 (which in effect defines "employee" for social security purposes) provides further that the legal relationship of employer and employee generally "exists when the person for whom services are performed has the right to control and direct the individual who performs the services, "not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done * * *. The right to discharge is also an important factor indicating that the person possessing that right is an employer."

That such a relationship existed between the claimant and the company up to February 2, 1937 is admitted; but when the company discharged the claimant that relationship, as defined by the foregoing regulations, was automatically terminated, and was evi-

dently so regarded by both parties: the company thereby lost all right of direction and control over the claimant, and he was thereby released from all duty to the company. That holding has been justified by the Supreme Court of Michigan. In the case of Stitt v. Locomotive Engineers Mutual Protective Association (142 N. W. 1110, 1113, 177 Mich. 207), the Supreme Court (in discussing the term "discharged" as applied to the relationship of master and servant) said, "A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him, and all contract relations are at an end." And that conclusion is strengthened by the definition of "employee" in Section 2 (3) National Labor Relations Act. In defining "employee" this section says in part, "The term 'employee' shall include * * * any individual whose work has ceased as a consequence of * * * and who has not obtained any other regular and substan-
19 tially equivalent employment * * *." In other words, for purposes of the National Labor Relations Act an "employee" may be a person whose services for his employer has ceased, a person whose "employment" as that term is used for social security purposes has ceased. And to hold that a "back pay" order by the National Labor Relations Board restores for a retroactive period a contractural right of direction and control (necessary to the legal relationship of employer-employee for social security purposes) which in the minds of both parties to the contract has been terminated, and which at the time of the Board order could not possibly be exercised for that retroactive period, would seem to do violence to the most basic concepts of jurisprudence.

A further indication that a "back pay" order does not presuppose (for the period in question) an employer-employee relationship as defined in Social Security Board Regulations No. 2 supra, is the fact that the National Labor Relations Board has authority to order "back pay" for an individual who has *never* been employed by the employer in question, and who could not possibly have had an employer-employee relationship with that employer (for social security purposes) during the period covered by the "back pay" order. In fact, the National Labor Relations Board and the Federal courts have repeatedly held that an employer-employee relationship (as defined by the Social Security Board) need not be established before a "back pay" order can properly be issued (see Referee's discussion of this question and citations, infra).

Whether an employer-employee relationship *as defined by Social Security Board* regulations is automatically terminated when an employer discharges an employee, is a question, the answer to which is not affected by *any* order subsequently issued by the

National Labor Relations Board; the answer remains the same whether the Board orders reinstatement with or without back pay, or whether it merely orders the employer to put the employee on a preferential hiring list. But the orders usually issued by that Board and the language of the National Labor Relations Act itself seem to reveal a Congressional understanding that that relationship terminates at discharge. In practically every case where the Board has found that an employee has been discharged because of unfair labor practices, it has required the employer to offer reinstatement (with or without back pay); and when the Board orders reinstatement, it contemplates that the employee will return to the same task or its equivalent; but if changed conditions make that impossible, the Board will amend its order to the effect that the employee be put on a preferential hiring list (see Republic Steel Case; November 18, 1939 (C.C.A. 6) 107 F. (2nd) 472; 309 U. S. 684). That act requiring the employer to put the employee on a preferential hiring list, implies that the employer-employee relationship (as defined in Social Security Board regulations) which has been illegally terminated nevertheless *has been actually terminated*. The person involved, however, just as in a case of *reinstatement*, may still be an "employee" within the meaning of the National Labor Relations Act (Acme Air Appliance Case; January 25, 1939; Vol. 19, D. & O. National Labor Relations Board 1-85, 1406-7, 14-). And the same implication is found in the language of the usual Board order (like the one in this case) which commands the employer to offer *reinstatement*. "Reinstatement" is the word used in Section 10 (c) of the National Labor Relations Act, and according to Webster, it means "To restore to a former state, station or authority." In other words, the offer of reinstatement is an offer to restore *presently* the employer-employee relationship (as defined by Social Security Board Regulations No. 2) and an offer to restore *retroactively* the status of an "employee" as defined by the National Labor Relations Act. Accordingly, the language of the National Labor Relations Act and of the Board order in this case clearly implies that the employer-employee relationship (as defined for Social Security purposes) did not exist between the date of the wage earner's discharge and the date of his offer of reinstatement.

Since, therefore, there was no employer-employee relationship between the claimant and the company between February 2, 1937 and September 1939 *within the meaning of the Social Security Act*, there was no "employment" as defined by that Act.

Furthermore, according to the social security law quoted above, there can be no employment without the performance of services; the evidence indicates that the claimant did not perform any services (actual or constructive) for the company during the period in question, and it is not even contended that he did. The old English doctrine of "constructive service" is in general disrepute in American courts as well as in many English courts, and even where recognized the doctrine applies to a situation in which an employee, under a contract of employment for a *specific* term, is dismissed without cause (but holds himself ready to perform the service contracted for)—a situation quite unlike the one involved in this case, and for that reason, need not be discussed here. It is advisable, however, to mention a recent Federal decision which has been interpreted by one writer as authority for applying the "constructive service" theory to orders issued by the National Labor Relations Board (Michigan Law Review, August 1942, p. 80, Volume 41).

In the case of National Labor Relations Board vs. Killoren (C. C. A. 8th Circuit (1941) 122 F. (2nd) 609), a "back pay" order had been issued against a company employer, but before the order was complied with, the company went bankrupt, and the question before the court was whether the "back pay" order constituted a prior claim against the assets of the company. Under bankruptcy law wages earned by the company's employees would ordinarily be considered as entitled to priority. A divided court held that National Labor Relations Board "back pay" was wages whose status (under the circumstances) was the same as unpaid wages earned by other employees in the normal course of the employer's business, and the court used this language:

> "We have declared above that a back pay allowance, under the provisions of the National Labor Relations Act is intended as, and constitutes, wages which a workman has constructively earned by reason of his continued status as an employee."

But elsewhere in the decision the court referred to the "back pay" in these words, "It is compensation to which he is entitled by reason of his continued status *under the Act* as an employee, and which the Act and the Order of the Board regard him as having constructively earned." [Italics supplied.] In other words, the court's "constructively earned" theory was based on the person's continued status as an "employee" as that term is defined in the National Labor Relations Act; and as already indicated, such an employee may be a person whose "employment" (as the term is defined in the Social Security Act) *has ceased*. Accordingly, this

Federal case is not authority for holding that during the period in question a person who received "back pay" under a National Labor Relations Board order, rendered "constructive services" (and was engaged in "employment") for Social Security purposes.

Under the Original Social Security Act the Social Security Board has sometimes recognized as "wages" certain payments like vacation pay, sick pay, etc. (Regulations No. 2, Article 15 (b)) made to employees for periods in which apparently no actual service was performed. Neither the Social Security Act nor Social Security Board Regulations issued to aid in its administration indicate whether such payments were considered "wages" because they constituted pay for *constructive services* rendered during the period involved, or whether they were considered "wages" because they represented pay for *actual services* rendered previously; but a determination of this question is not important here because in every such case the payment was made for services rendered in a period in which there was an employer-employee relationship *as defined by Social Security Board Regulations*.

Therefore it must be held that the claimant did not perform any services for the company between February 2, 1937 and
23 September 1939, and that for this reason, too, he was not engaged in "employment" (for Social Security purposes) during that period.

It may be argued that the portion of the Order issued by the National Labor Relations Board which commanded the company to "make whole * * * for any loss of pay * * * by payment * * * of a *sum of money* equal to that which each would have earned as wages during that period * * *" [italics supplied] was intended to give the claimant social security wage credit for the amount paid. The Order doesn't say so. The language beginning "by payment" and ending with "period" indicates persuasively that as to this part of the order, the National Labor Relations Board had in mind making the claimant "whole" financially by paying him a sum of money without any thought as to how that sum would be considered for such purposes as Unemployment Compensation, Old-Age Benefits, etc. As a matter of fact the language of the order shows convincingly that the Board did not regard the "back pay" as wages earned during the period involved. Note that it says, "sum of money equal to that which each would have earned during the period in question."

In this connection we should remember that the main objective of the National Labor Relations Act was to promote better relations between employers and employees by preventing unfair labor practices; and that to achieve that end Congress authorized the

National Labor Relations Board (Section 10 of the National Labor Relations Act) to issue, cease and desist orders and "to take such affirmative action, including *reinstatement of employees with or without back pay*" [italics supplied] as seems necessary to carry out the purpose of the Act. A "back pay" order is merely one of the results of the power granted to the National Labor Relations Board to promote better relations between employers and employees; the Act does not even suggest that the "back pay" is remuneration for services. An employee, like the claimant in this case, has no *right* to demand compensation from the employer for the period involved; and it is for the National Labor
24 Relations Board to determine (in any case) whether the reinstatement will be "with or without back pay." In this connection the Federal courts have held that the National Labor Relations Act does not confer any right of action triable by jury or otherwise as between employer and employee; that it does not authorize an employee to make a claim; that it does not even purport to confer private rights on an employee, and that the procedure outlined by the statute is not designed to award damages as such. In making a decision to this effect the Federal court said, "The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure looking only to public ends. The statute has in mind the maintenance of industrial amity, and therefore peace, the prevention of industrial war.

* * * * *

"The statute authorized reparation orders not in the interest of the employee, but in the interest of the public. A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages. It is a public reparation order, operating retrospectively by way of an order to cease and desist as to unfair practices from their beginning; practices as to which, because forbidden in the interest of industrial amity, and therefore peace, Congress has the right to eradicate them as from the beginning." (Agwilines, Inc. v. National Labor Relations Board, 87 F. (2nd), 146.)

Therefore, the very nature and objective of a National Labor Relations Board's action in ordering reinstatement "with back pay" indicates that the amount so paid *is not considered by the National Labor Relations Board as remuneration for services rendered.*

And that conclusion is strengthened by the fact that (as previously mentioned) the National Labor Relations Board has authority to grant "back pay" to an individual who has never been employed by the employer in question, and who, therefore, could

not possibly have had with that employer an employer-
25 employee relationship *for social security purposes*. In the Waumbec Mills Case (National Labor Relations Board Case No. C–715) an employer refused to hire two individuals because of their past union activities. These two individuals filed charges against the employer with the National Labor Relations Board. The Board ordered reinstatement with "back pay" holding that that part of the National Labor Relations Act (Section 10 (c)) which reads, "including reinstatement of employees with or without back pay * * *" did not mean that the employer-employee relationship (as defined in Social Security Board Regulations No. 2 supra) must be established before the proscriptions of the Act could be applied, but that the language just quoted was only suggestive of the broad Board power to remedy a violation. The Circuit Court of Appeals sustained that principle (National Labor Relations Board vs. Waumbec Mills Incorporated, 114 F. (2nd) 226, CCA–1, 1940); and that principle has also been confirmed by the United States Supreme Court (Phelps Dodge Corporation vs. National Labor Relations Board, 86 L. Ed. 753 (1941).[1] And in several other cases the National Labor Relations Board has required employers to offer employment to and to pay "back pay" to men whom they had never employed.

But there is another cogent reason for concluding that "back pay" as used in the National Labor Relations Act was not intended to mean remuneration for services rendered, and was not intended to give the employees concerned wage credit for social security purposes. In this case, as in the usual case, the Board's order commanded the employer to pay to the employee concerned "a sum of money equal to that which each would have earned as wages during the period from the date of such discrimination against him to the date of the offer of reinstatement, less his net earnings during that period; deducting, however, from the amount otherwise due to each of the said employees, monies received by
26 said employee during said period for work performed upon Federal, State, county, municipal, or other work-relief projects." And that provision was in harmony with the Supreme Court's ruling in the case of Republic Steel Corporation vs. National Labor Relations Board (311 U. S. 7). In that case the Board had directed the company to deduct from back payments to the reinstated employees the amounts they had received for work performed upon work-relief projects; and in its decision the Supreme Court said: "The amounts earned by the employees before reinstatement were directed to be deducted from their back

[1] 313 U. S. 177.

pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amount in public or private employment."

Accordingly, it is obvious that the objective of the "back pay" order is merely to make good the financial losses accruing to the employee because of the employer's violation of the law, by requiring the employer to reimburse the employee to the amount he "would have earned" if he had continued to work for the employer during the period in question, less the specified deductions. It is even more evident that it is not the objective of a "back pay" order to give the employee social security wage credit in the amount he "would have earned" if he had continued to work for the employer during the period in question. If that was one of the objectives of a "back pay" order, it could be accomplished only by ordering payments of the *entire amount* which the employee "would have earned," less earnings received during that period which can be considered "wages" under the Social Security Act. But the National Labor Relations Board order doesn't do that. In computing "back pay" the Board is required to deduct from the amount which the employee "would have earned" *any* earnings of the employee during that period, including pay received in the employ of the United States, or a State or a political subdivision thereof—pay which cannot be considered "wages" under Sections 210 (a) and 210 (b) of the Original Social Security Act.

27 And it seems self-evident that if the National Labor Relations Board were authorized to give Social Security wage credit in its effort to "make whole" an employee, it would give such credit for the entire amount which he "would have earned," and not merely for part of it.

While it is not essential to a decision in this case, the Referee believes it pertinent to observe that under the National Labor Relations Act the National Labor Relations Board does not appear to have any authority to determine what constitutes "wages" or "employment" for social security purposes. The Board's total authority, if any, with respect to these matters is contained in that part of Section 10 (c) of the National Labor Relations Act which authorizes it to order an employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate *the policies of this Act*." [Italics supplied.] And those policies are explained by Section 1 of the National Labor Relations Act in these words:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions

when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

From the foregoing it is clear that the National Labor Relations Board's jurisdiction in these matters is limited by the policies of the Act, and it is equally clear that these policies do not directly or impliedly authorize the giving of social security wage credit.

But there is a more compelling statutory reason for concluding that Congress did not give the National Labor Relations Board any authority to determine "wages" or "employment" for social security purposes. If the National Labor Relations Act does confer such authority, it is to that extent in conflict with the Social Security Act, and the National Labor Relations Act should state (as it does concerning other conflicting statutes) that when such conflict exists its provisions shall prevail. Section 14 of the National Labor Relations Act as originally passed (July 5, 1935) and as amended (June 25, 1936 and December 6, 1941) provides that whenever application of certain specified statutes conflicts with application of the provisions of the National Labor Relations Act, the provisions of the latter "shall prevail," but the Social Security Act is not one of the statutes specified, although it was nearing passage on July 5, 1935 and was enacted August 14, 1935, ten months prior to the first amendment to the National Labor Relations Act, and more than two years before the second amendment to that Act. Therefore, in view of these facts, and without considering accepted rules of statutory construction which would only strengthen the following conclusion, it is reasonable to hold that the National Labor Relations Board could not legally order that a "back pay" amount like the $3,501.32 be considered "wages" *for social security purposes*.

It is clear from the foregoing that an employer-employee relationship did not exist between the claimant and the company during the period involved; that the claimant did not render any services for the company during that time; and that the payment of $3,501.32 was not given to the claimant as remuneration for services performed by him for the company. Consequently, the only decision which the Referee can legally make is that this amount did not constitute "wages" as that term is defined in Section 210 (a) of the Original Social Security Act.

LOWELL W. RAYMOND, *Referee*.

Date May 13, 1943.

29 Form AC–507 (7–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Notice of hearing

IN THE CASE OF JOSEPH NIEROTKO (NAME OF CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER'S NAME); 385–10–5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

To MR. JOSEPH NIEROTKO,
3761 St. Aubin, Detroit, Michigan.

In response to a written request in the above case, a hearing will be held by the undersigned, a referee of the Social Security Board, on the 19th day of April 1943 at 9:00 A. M. o'clock in Room 631 of Lafayette Building, Detroit, Michigan. If you cannot be present at that time please notify me at once.

You may present at the hearing any evidence on the issues, either in the form of written documents or the oral testimony of witnesses.

You may call upon the manager of the Field Office located at 510 Lafayette Building, Detroit, Michigan, for information and advice with regard to the hearing.

Remarks:

Referee
521 Union Commerce Building, Cleveland, Ohio.

Date April 5, 1943.

30 Form AC–512 (7–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

Appointment of representative

I appoint Morton A. Eden to act as my representative with respect to my claim under the Social Security Act, growing out of the employment of Joseph Nierotko.

The above-named representative is authorized to obtain from the Bard nformation concerning my claim; and it is understood

that any notice or request sent to him shall have the same force and effect as if sent to me.

JOSEPH NIEROTKO.

Date April 19, 1943.

ACCEPTANCE OF APPOINTMENT BY ATTORNEY

I accept the above appointment. I have been admitted to the practice of law, and I am in good standing in (1) the courts of the State of my residence and (2) the Federal Courts.

(Note: The attorney may strike out (1) or (2) if he is not admitted to both the Federal and State Courts.)

MORTON A. EDEN,
3220 Barlum Tower, Detroit, Michigan.

Date April 19, 1943.

See Reverse Side for Regulations as to the Fees of Representatives for Services to a Party.

31 Section 403.713 (d) of Regulations, No. 3 of the Social Security Board provides:

"Fees for the services of a representative, appointed and qualified in accordance with paragraphs (a) and (b) of this section, may be charged and received from the party represented only as is provided in this paragraph.

"A fee in an amount not greater than $10.00 may be charged and received by an attorney who is admitted to practice before the highest court, or an inferior court, of a State, Territory, District, or insular possession or before the Supreme Court of the United States or an inferior Federal Court, and who is not otherwise prohibited by law from charging or receiving such a fee. Upon the petition of such an attorney the Bureau, a referee, or the Appeals Council may, for good cause shown authorize the attorney to charge and receive a maximum fee in excess of $10.00.

"No individual other than an attorney, as above provided, may charge or receive a fee unless he has filed a written petition therefor and has made a satisfactory showing in each case that he is not otherwise prohibited from charging or receiving a fee, that he has special qualifications which enable him to render valuable services to a party and that he has rendered such services to the party he represents. Upon the filing of such petition and the making of such showing the amount of any fee shall be determined in each case by the Bureau, a referee or the Appeals Council and no fee shall be charged or received in excess thereof."

Section 206 of the Social Security Act Amendments of 1939 provides:

"* * * Any person * * * who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum

fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee prescribed by
32 the Board shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both."

Form AC–501 (6–40)

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Request for hearing

IN THE CASE OF JOSEPH NIEROTKO (NAME OF CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER'S NAME); 385–10–5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

To the Social Security Board:

I disagree with the determination made on the above claim, and therefore request a hearing before a referee of the Social Security Board.

Remarks: (If you wish you may use this space for statement of reasons for disagreement).

I believe that the wages paid to me under the National Labor Relations Board ruling are taxable and therefore I should receive credit for them under Title VIII of the Social Security Act. I disagree with the ruling in the letter dated February 27, 1943 and desire a hearing in this matter.

(Signed) JOSEPH NIEROTKO,
Claimant.
Address—5751 St. Aubin, Detroit, Michigan.

Date 3/19/43.

33 ACKNOWLEDGMENT OF REQUEST FOR HEARING

Your request for a hearing (of which the above is a copy) was filed on 3/19/43 at 510 Lafayette Building, Detroit, Michigan. The referee will notify you of the time and place of the hearing at

least 10 days prior to the date which will be set for the hearing.

For the Social Security Board

By (Signature) CHAS. L. HICKEY,
Assistant Manager,
540 Lafayette Building, Detroit, Michigan.

To Mr. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit, Michigan.

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Transcript of hearing

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER); 385-10-5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

ELSIE LEVAR,
Hearing Stenographer.

LOWELL W. RAYMOND,
Referee.

April 19, 1943, Detroit, Michigan.

34 *Opening statement*

Lowell W. Raymond, Referee: I want to explain at the outset, Mr. Nierotko, that this is not a court and I am not acting as a judge in a case between you and the Government. As a referee, I am interested generally in just two things, first, in finding out the complete facts concerning your employment and wages since January 1, 1937, and, second, in ascertaining whether in view of those facts the Social Security Board can legally give you wage credit in excess of that which is has already given you. Specifically, I am interested in ascertaining whether the Social Security Board can legally give you wage credit for the money which the Ford Motor Company paid you by reason of a ruling made by the National Labor Relations Board. I am sure you realize that the Social Security Board cannot legally grant wage credit to anyone who hasn't met all the wage requirements fixed in the law, and I am equally certain you understand that those requirements can be changed only by Congress. In view of those facts, and in view of the information that you have already received concerning this question, you can readily understand why the Board can-

not give you wage credit for the money which the Ford Motor Company paid you because of that ruling, unless the Board is convinced that that money represented remuneration for employment as that term is used in the Social Security Act.

I assure you the Board wants to grant you every benefit to which you are entitled under the law, and on the basis of the facts
35 in your case, and this is the Board's way of finding out those facts. As I said a moment ago, this is not a formal court proceeding and I want you to feel quite at ease during this hearing.

For the benefit of your attorney, Mr. Eden, I wish to explain that because of a statutory provision, when a representative of the Appeals Council conducts hearings of this sort, he is not required to observe the ordinary rules of testimony. The apparent reason for that provision is that Congress wanted the Social Security Board to get all the facts, including some that could occasionally be excluded by a strict application of the rules of testimony.

According to our records, Mr. Nierotko, the following is a brief history of your case up to this point. I wish you and Mr. Eden would follow this closely and when I am through tell me if you agree that it is a fair statement of your case up to today.

Our records show that in a statement made November 3, 1942, you said that between January 1937 and March 1942, inclusive, you had received from the Ford Motor Company wages in the amount of $7,916.05, explaining that $3,501.32 of it was paid to you pursuant to a ruling by the National Labor Relations Board, and that it pertained to a period from sometime in 1937 until August 1939 because you had been discharged in 1937 for union activities. The Bureau of Old-Age and Survivors Insurance of the Social Security Board gave you credit for all the wages claimed in your statement except the item of $3,501.32. The Bureau held that you were not entitled to wage credit for the $3,501.32 because that amount did not constitute remuneration for services rendered but was in the nature of a penalty and therefore did not constitute remuneration for employment. And on February 27, 1943, the Bureau sent you a letter to that effect.

On March 19, 1943, you appealed from that decision, contending that the $3,501.32 which you received as a result of the ruling of the National Labor Relations Board should be considered wages.

36 Under the circumstances, that is the only question to be considered at this hearing. Do you agree that that is a fair statement of the case up to this moment?

WITNESS. Yes; it is.

REFEREE. At this point, Mr. Nierotko, I want to introduce some papers into the record, and as I do, I want to explain them to you.

LIST OF EXHIBITS

Exhibits		Page No.
A	Form OAR-7008 dated November 3, 1942, signed by Joseph Nierotko	5
B	Copy of letter dated February 27, 1943, to Joseph Nierotko from the Social Security Board in regard to wages credited to his account	12 & 13
C	Report of contact dated April 19, 1943, made by a representative of the Social Security Board, after interviewing the Chief of the Employment Tax Division, Bureau of Internal Revenue, in regard to taxes paid on Joseph Nierotko's wages	

Transcript of hearing in the case of Joseph Nierotko to determine whether remuneration paid to him as a result of a ruling by the National Labor Relations Board was wages, Social Security Account Number 385-10-5766. The hearing was held at 9:00 A. M., April 19, 1943, at 631 Lafayette Building, Detroit, Michigan. The claimant was present and was represented by his attorney, Morton A. Eden.

37 Mr. JOSEPH NIEROTKO was called by the referee and, after being duly sworn, testified as follows:

Questions by LOWELL W. RAYMOND, Referee:

Q. Will you state your full name and your present address, please?

A. Joseph Nierotko, 5751 St. Aubin Ave., Detroit.

Q. What is you age, Mr. Nierotko?

A. 59.

Q. Have you worked for anybody besides the Ford Motor Company since January 1, 1937?

A. No.

Q. Am I correct in understanding that the only disagreement you have with the Social Security Board with reference to your wage credit is your disagreement over that item of $2,501.32 which you received as a result of the ruling by the National Labor Relations Board?

A. Yes.

Q. How long have you worked for the Ford Motor Company?

A. Since 1925.

Q. What is the nature of your work?

A. I have been a polisher.

Q. Did you stop working for the Ford Motor Company in 1937?

A. I was discharged by the Ford Motor Company for union activities on February 3, 1937.

Q. What was your rate of pay at that time, Mr. Nierotko?

A. $6.20 a day.

Q. Were any other employees discharged at the same time that you were and for the same reason?

A. I think there were, but I don't know for sure.

Q. Exactly when did you return to work at the Ford Motor Company?

A. September 1939.

Q. Do you have a copy of the ruling from the National Labor Relations Board as a result of which you got $3,501.32?

38 A. I do not have a copy, but my attorney does have.

Q. Did you receive any other correspondence from the National Labor Relations Board concerning its decision?

A. No.

(At this point, Mr. Eden, the claimant's attorney, requested that the referee admit into the record by reference the following: (1) The reported case, entitled, "In the matter of Ford Motor Company and International Union of United Automobile Workers of America," Case No. C-199, decided August 9, 1939, and reported in Volume 14 of the Decisions and Orders of the National Labor Relations Board, pages 346 to 410. (2) The reported case of the National Labor Relations Board vs. Ford Motor Company, 114 Fed. 2nd, P. 905. By its decision on October 8, 1940 in this case, the U. S. Circuit Court of Appeals for the 6th Circuit enforced (in part) the order made by the National Labor Relations Board on August 9, 1939, supra. (3) Report of action taken by the Supreme Court of the United States in the same case in denying a petition for certiorari on February 10, 1941. Case is reported in 312 U. S. 689. (Referee admitted this material to the record.))

Statement by Mr. EDEN, Attorney:

The sum of money involved in this case was paid pursuant to and computed in accordance to the foregoing order of the National Labor Relations Board, as enforced by the U. S. Circuit Court of Appeals for the Sixth District.

Q. Mr. Nierotko, where did you work between the time when you were discharged by the Ford Motor Company and the time you resumed your work?

A. I had no other work.

Q. During that time, did you live on your savings that you had made prior to that?

A. I had some money and my wife she worked. I tried to get a job but couldn't.

Q. Do you know, Mr. Nierotko, whether the Ford Motor Company paid unemployment compensation tax on the $3,501.32?

A. I don't know.

39 Q. Did the Ford Motor Company deduct your social security tax from the amount awarded you by the National Labor Relations Board?

A. The amount of $3,501.32 represented the amount due as wages only and my attorney can explain the rest of it.

Mr. Eden, attorney for claimant, explained the following from the records in his possession:

The one percent social security tax was not deducted from the total amount awarded to Mr. Nierotko by the National Labor Relations Board. That was true of all 25 cases included in the National Labor Relations Board's ruling of August 9, 1939, but in each of 3,000 subsequent cases the Ford Motor Company withheld the one percent social security tax (pending a final determination as to whether amounts paid under such ruling constitute wages), pursuant to an agreement with the union. There was no such agreement in this case.

Q. Mr. Nierotko, is there any additional statement that you would like to make?

A. No.

Q. If I should receive any additional evidence, do you want to see it and do you want your attorney to see it?

A. Yes; I want my attorney to see it.

REFEREE to attorney: Is there any argument or statement that you would like to make, Mr. Eden, for the record?

Statement

MR. EDEN, Attorney: In the case of Hector F. Manseau vs. United States of America, Civil Action 3555 now pending in the District Court of the United States for the Eastern District of Michigan, Southern Division, brought to recover income tax paid under protest, on back pay received from the Ford Motor Company by the plaintiff, under the same order of the National Labor Relations Board as is involved in the case of Mr. Nierotko, the Government contends that "The award of back pay fell within income 'derived from * * * wages or compensation for personal services,'" referring to section 22 (a) of the Internal Revenue Code, which defines income.

(Attorney for claimant presented an unsigned list of the 25 men whose rights were considered by the National Labor Relations Board in its Case No. C-199 and who were awarded back pay by the National Labor Relations Board at the same time the claimant was awarded his. According to the list, the amounts of total back pay awarded ranged from slightly over $2,000 to more than $5,000 each; in each case the National Labor Relations Board deducted from the total "back pay" earnings, if any, received by the employee during the period involved, and granted an award called "net amount." The referee did not consider it necessary to retain for the record a copy of the list.)

REFEREE to claimant: That is all I want to ask you, Mr. Nierotko. If I get additional information from the Ford Motor Company I

will let Mr. Eden see it. I may make the decision in this case, or it may be made in Washington, but irrespective of where it is made, it will be done just as soon as we can do it, consistent with a careful study of the evidence and the applicable law. You will be informed just as soon as the decision is made.

We have read the foregoing and hereby certify that it is a true and complete statement of the questions and answers constituting the examination.

LOWELL W. RAYMOND,
Referee.

ELSIE LEVAR,
Hearing Stenographer.

The record was reopened on May 4, 1943, for the purpose of admitting the following document in evidence. The pertinent part of this letter has been brought to the attention of the claimant's representative:

Exhibit D—Letter from the Ford Motor Company address to the manager of the Dearborn, Michigan, field office, dated April 29, 1943.

40–A

Exhibit A

Corrected Form

Form OAR–7008 (8–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

(To be filled out by wage earner)

Date 11–3–42.

SOCIAL SECURITY BOARD, *Baltimore, Md.*

I have received your statement of my wage credits for the years from Jan. 1937 to Septm. 1939 but to the best of my knowledge it is not correct.

1. My name as it appears on my account number card is Joseph Nierotko.

2. My employer may have reported my name as Ford Motor Company.

3. My account number is 385–40–5766. 4. My date of birth is 3–16–94 1884.

5. Other account numbers I have used are prepare wheels to polishing.

6. My present address is 5751 St. Aubin, Detroit, Michigan.

7. Telephone number where I can be reached is Cadillac 7052.

The Social Security Board may disclose my name to my employer if, in securing wage information, it is found to be necessary. Yes ☒; No ☐.

(Signature) JOSEPH NIEROTKO.

STATEMENT OF WAGES AND EMPLOYMENT

(Read instructions on other side)

Show in date order your employment for the year(s) in question.

I Worked	Name of employer (give business or firm name)	Total pay received (include also any wages other than cash)	Kind of work done by me
From Jan. 1937 to Feb. 1937	1. Name, Ford Motor Company City and State, Dearborn, Michigan Type of business, Auto Mfr.	$110.00	Metal Polisher
From 1937 to Aug. 1940	2. Name, Ford Motor Co. City and State, Dearborn, Michigan	$3,301.32	No work performed and wages paid under ruling by NLRB
From Sept. 1940 to Mar. 1942	3. Name, Ford Motor Company City and State, Dearborn, Michigan	$1,267.13	Metal Polisher

(Use other side of this sheet if more space is needed)

40-B

INSTRUCTIONS

If you worked for more than seven employers during the period for which amounts are questioned, give the same information for others on a blank sheet attached to this statement.

Be sure to give all names and all account numbers under which you worked. If your employer used a nickname for you on his pay roll, give that. If you worked under your maiden name and are now married, give both names.

Give the business names of your employers; not the names of supervisors or foremen. Example: Central Construction Company.

In giving the nature of your employer's business, be as clear as possible. Examples: Retail grocery store; foundry; construction company. If he had several businesses give only the one where your worked.

In giving the nature of your work be as clear as possible. Examples: Clerk in store; traveling salesman on commission; carpenter; stenographer.

If part of your pay was not in cash show what it was in the column listing "Total Pay Received." Example: $260 plus 6 meals a week.

Wages are credited to your account in the quarter in which they were paid. (A quarter is three calendar months as follows: January 1 to March 31; April 1 to June 30; July 1 to September 30; October 1 to December 31. If you earned wages in any quarter which were not paid in that quarter, indicate when payment was made.)

When you have filled out this form, mail it in an envelope to: Social Security Board, Baltimore, Md.

41 *Exhibit B*

14:WR:CW

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

FEBRUARY 27, 1943.

Re: Account Number 385-10-5766

MR. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit Michigan.

DEAR MR. NIEROTKO: This is in further reference to your request for a statement of the amount of wages credited to your Old Age and Survivors Insurance account.

Our records show wages now credited to your account as follows:

1937 yearly total	$149.60
1939 yearly total	426.28
1940 yearly total	1,324.54
1941 yearly total	1,955.70
1/1/42—3/31/42	558.61
4/1/42—6/30/42	625.60
Grand total	5,040.33

You stated on the Form OAR-7008 completed by you that as a result of the action by the National Labor Relations Board, you were paid the sum of $3,501.32 by the Ford Motor Company.

The term "wages" as defined by the Social Security Act means all remuneration for "employment." "Employment" means any service of whatever nature performed within the United States by an employee for his employer unless specifically excluded by the Social Security Act as amended. The payment made to you by the Ford Motor Company was in the nature of damages

42 and did not constitute remuneration for employment. This

amount, therefore, cannot be credited to your Old-Age and Survivors Insurance account.

We have been informed by our field office that you would disagree with a finding by the Social Security Board that the amount in question was not wages as that term is defined in the Act. If you wish to have a hearing in this matter before a referee you should contact our field office at 304 Federal Building, Detroit, Michigan, and inform them that you wish them to proceed with your request for a hearing.

A wage statement furnished you by this office may not include all of your wages for the last two completed quarters because of the time required to receive and record reported wages.

Sincerely yours,

O. C. PEGGE, *Director.*

cc: FO—304 Federal Bldg., Detroit, Michigan.
mso: gm.

Exhibit C

Form OAC–5002 (10–39).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

BUREAU OF OLD-AGE AND SURVIVORS INSURANCE

Report of Contact

Name: Joseph Nierotko. Address: 5751 St. Aubin, Detroit, Michigan. Office: Detroit, Michigan. Date: April 19, 1943. Account No. 385–10–5766.

Person contacted: Mr. Swanson, Chief Employment Tax Division. Address: Collector of Internal Revenue, Detroit, Michigan.

43 Contact made: By telephone. Place of contact: Give brief statement of information requested and given:

Mr. Swanson was called to determine whether the Ford Motor Company had paid the unemployment compensation taxes with respect to wage payments ordered by the National Labor Relations Board.

He stated that conversations were held with administrative officials of the Ford Motor Company relative to the tax and they understand that the tax should be paid. The conversations were specifically in relation to how the payments were to be made. Mr. Swanson stated that it could not be determined from their files which tax payments were specifically National Labor Relations Board wages, but he feels that such tax payments were made.

Contact made by Zeldon S. Cohen, Administrative Assistant, OA & SI.

(This form must be filled out in ink or on typewriter, as it becomes a permanent record.)

Exhibit D

FORD MOTOR COMPANY
3000 Schaefer Road
DEARBORN, MICHIGAN

APRIL 29, 1943.

Mr. ROBERT G. MISH.
Manager, Social Security Board Field Office,
14216 Michigan Avenue, Dearborn, Michigan.

DEAR SIR: This refers to your letter dated April 1, 1943, addressed to the attention of Mr. D. C. Moffitt, Auditing Department, in which you request certain information in regard to Mr. John Cwikiel, Social Security No. 367–07–9734, and Mr. Joseph
44 Nierotko, Social Security No. 385–10–5766. The information requested relates to certain amounts paid by Ford Motor Company to the individuals named in accordance with an order of the National Labor Relations Board as modified by the United States Circuit Court of Appeals.

With reference to your request for a copy of the National Labor Relations Board decision, it occurs to us that it would better serve the purpose of the regional claims referee if he would refer to the official report of this decision and order which will be found in 14 NLRB 346 and to the official report of the opinion of the United States Circuit Court of Appeals which will be found in 114 Fed. (2d) 905, rather than to use such excerpts from that order and opinion as might be selected by this company.

The following is the information, as shown in the records of this company, which is requested in regard to Mr. Joseph Nierotko, Social Security No. 385–10–5766, following the questions contained in your letter:

(a) Q. Period of employment—how long was individual employed and nature of duties since January 1, 1937?

A. Hired prior to January 1, 1937. Worked to February 3, 1937. Occupation—Polisher.

(b) Q. Date of National Labor Relations Board ruling or action?

A. National Labor Relations Board order dated August 9, 1939.

(c) Q. Date of employee's discharge; cause of discharge?

A. Records show paid off February 3, 1937. (Since it seems that the cause of the termination of service would have no bearing

on any question involved in a determination of benefits under the Social Security Act, this information is omitted.)

(d) Q. Amount of "back pay" paid to individual; date of payment; period covered by "back pay"?

A. Net amount paid to Joseph Nierotko, $2,501.32. Date of payment: June 18, 1941. Period covered: February 2, 1937, to September 25, 1939.

45 (e) Q. During period covered by "back pay" was any work performed by this individual? Was individual considered an "employee? Was he subject to call during that period? Was he considered an employee for any purpose? Was he removed from active roll?

A. No work was performed for Ford Motor Company by this individual during the period covered by "back pay." This individual was removed from the active roll, was not considered an employee for any purpose, and was not subject to call during the "back pay" period.

(f) Q. Has the company paid either the social security tax, unemployment compensation tax, or workmen's compensation tax on the "back pay"?

A. This company has not paid any taxes or contributions based upon this "back pay" under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, or under the Michigan Unemployment Compensation Act. There is no workmen's compensation tax on remuneration for services performed under the laws of Michigan.

In this connection it is desired to mention that this company would like an opportunity to be heard, at some time before final determination, in any proceeding involving the question whether so-called "back pay" awards of the National Labor Relations Board constitute "wages" within the meaning of the Social Security Act, as amended, or the Federal Insurance Contributions Act, as amended, or the Federal Unemployment Tax Act, as amended.

Yours very truly,

FORD MOTOR COMPANY,
L. E. BRIGGS,
Auditing Department.

LEB:vb.

46 In United States District Court

Notice of hearing on motion for summary judgment

Filed June 13, 1944

To the Clerk of said Court:

Please place the attached Motion for Summary Judgment in the above entitled cause on the motion docket of the Honorable Edward J. Moinet, District Judge, for Monday, June 12, 1944, at 10 o'clock A. M.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant.

To: ERNEST GOODMAN and MORTON A. EDEN,
Plaintiff's Attorneys, 3220 Barlum Tower, Detroit 26, Michigan.

Please take notice that the attached Motion for Summary Judgment in the above entitled cause will be brought on for hearing before the Honorable Edward J. Moinet, District Judge, in his courtroom in the Federal Building at Detroit, Michigan, on Monday, June 12, 1944 at 10 o'clock A. M.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: June 3, 1944.

47 In United States District Court

Motion for summary judgment

Filed June 13, 1944

Now comes the defendant, the Social Security Board, and respectfully moves this court for summary judgment in the above-entitled action pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law; and for judgment in accordance with Section

205 (g) of the Social Security Act Amendments of 1939 affirming the decision of the Social Security Board under review herein.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant, Social Security Board.

In United States District Court

Order granting defendants motion for summary judgment on the pleadings

Aug. 4, 1944

The motion of the defendant for a summary judgment on the pleadings in this cause having come on for hearing, the arguments of counsel having been heard, and it appearing that there is no genuine issue as to any material fact, that the moneys paid by the Ford Motor Company to the plaintiff, pursuant to a "back pay" award entered under the National Labor Relations Act, covering the period February 2, 1937 to September 25, 1939,
48 do not constitute "wages" as defined by Section 210 (a) of the Social Security Act of 1935, because they are not "remunerative for employment" and accordingly could not and cannot be credited to his Old Age and Survivors Insurance Account under the provisions of the Social Security Act, and that the defendant therefore is entitled to a judgment herein as a matter of law.

It is ordered, adjudged and decreed that the motion of the defendant for a summary judgment on the pleadings herein be and the same hereby is granted, and judgment is entered herein for the defendant and against the plaintiff, with costs.

EDWARD J. MOINET,
District Judge.

U. S. DISTRICT COURT,
Eastern District of Michigan, ss:

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

GEORGE M. READ,
Clerk.
By JOHN J. GINTHER,
Deputy Clerk.

Dated August 4, 1944.

In United States District Court

Notice of appeal to circuit court of appeals

Filed August 30, 1944

Notice is hereby given that Joseph Nierotko, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the Order Granting Defendant's Motion for Summary Judgment on the Pleadings entered in this action on August 4, 1944.

ERNEST GOODMAN and MORTON EDEN,
Attorneys for Appellant,
3220 Barlum Tower, Detroit 26, Michigan.

Dated August 30, 1944.

49 In United States District Court

Proof of mailing of notice of appeal

Filed September 1, 1944

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, George M. Read, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that I did, on the 1st day of September A. D. 1944, send by mail copy of the Notice of Appeal and of bond for costs on appeal in the above entitled cause to the following named persons at the address given:

John C. Lehr, U. S. Attorney, 829 Federal Building, Detroit 26, Michigan; Arnold W. Lungerhausen, Asst. U. S. Attorney.

GEORGE M. READ,
Clerk,
By ALBERT L. ALLRED,
Deputy Clerk.

Dated Detroit, September 1, 1944.

In United States District Court

Stipulation as to contents of record on appeal

Filed September 26, 1944

It is hereby stipulated and agreed by and between the above parties, through their respective attorneys, that the following

documents filed in this cause shall constitute the entire record on appeal to the Circuit Court of Appeals in this cause:

1. Complaint.
2. Answer.
3. Notice of hearing on Motion for Summary Judgment.
4. Motion for Summary Judgment.
5. Order Granting Defendant's Motion for Summary Judgment on the Pleadings.

50 6. Notice of Appeal.

7. Proof of mailing of notice of appeal.
8. Within stipulation as to contents of record on appeal.
9. Stipulation of counsel approving transcript of record.
10. Clerk's certificate to transcript.

It is further stipulated and agreed that the Record on Appeal as filed be certified and transmitted by the Clerk of the District Court to the United States Circuit Court of Appeals for the Sixth Circuit, without the necessity of comparing the same with the originals on file.

ERNEST GOODMAN and MORTON A. EDEN,
Attorneys for Plaintiff.

JOHN C. LEHR,
United States Attorney.
BY ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorney for Defendant.

Dated at Detroit, Michigan, this 25th day of September 1944.

In United States District Court

Order extending time within which to file and docket record on appeal

Filed October 5, 1944

51 On reading and filing the stipulation of attorneys for plaintiff and defendant in the above-entitled cause for an extension of time within which to file and docket the Record on Appeal in said cause.

It is ordered that the time within which to file and docket the Record on Appeal in the above-entitled cause may be and hereby is extended to November 27, 1944.

EDWARD J. MOINET,
District Judge.

In United States District Court

Stipulation extending time within which to file and docket record on appeal

Filed October 5, 1944

It is hereby stipulated and agreed by and between the above parties through their respective counsel that the time within which to file and docket the record on appeal in the above-entitled cause may be extended to November 27, 1944.

ERNEST GOODMAN and MORTON A. EDEN,
Attorneys for Plaintiff.
JOHN C. LEHR, *United States Attorney,*
By ARNOLD W. LUNGERHAUSEN,
Assistant U. S. Attorney.
Attorneys for Defendant.

Dated at Detroit, Michigan, this 5th day of October 1944.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted

April 3, 1945

Before SIMONS, ALLEN, and HAMILTON, JJ.

This cause is argued by Ernest Goodman for Appellant and by Hubert H. Margolies and C. T. Dinn for Appellee and is submitted to the court.

In United States Circuit Court of Appeals, Sixth Circuit

Judgment

Entered: May 14, 1945

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and the cause remanded

for further proceedings in conformity with the opinion of this court.

[File endorsement omitted.]

54 In United States Circuit Court of Appeals, Sixth Circuit

No. 9896

JOSEPH NIEROTKO, APPELLANT

v.

SOCIAL SECURITY BOARD, APPELLEE

Appeal From the District Court of the United States for the Eastern District of Michigan, Southern Division

Before SIMONS, ALLEN, and HAMILTON, Circuit Judges.

Opinion

Filed May 14, 1945

SIMONS, Circuit Judge. So far as federal reviewing courts are concerned, the legal issue presented by the appeal is one of first impression, and simply stated is whether "back pay" awards made by an employer in compliance with an order of the National Labor Relations Board, constitute "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account. The Social Security Board refuses to consider such awards as wages and the district court upheld its position in the present suit against it, by entering summary judgment for the defendant upon the pleadings.

The appellant is one of a number of employees of the Ford Motor Company, discharged on February 2, 1937, because of union activities. He was subsequently reinstated as an employee in response to an order of the National Labor Relations Board of August 9, 1939, the enforcement of which was by us directed in National Labor Relations Board v. Ford Motor Co., 114 Fed. (2d) 905 (cert. den. 312 U. S. 689). On July 18, 1941, the Ford
55 Motor Company paid the appellant $3501.32 as back pay covering the period February 2, 1937 to September 25, 1939, since he failed to secure other employment during that time. Under agreement, however, the company is withholding 1% of this amount for the appellant's Social Security tax pending the outcome of the present litigation, and so presumably will not claim immunity from the excise tax in equivalent percentage.

The Bureau of Old Age and Survivors Insurance of the Social Security Board refused to credit the back pay award on the ground that it does not constitute wages. The appellant appealed from the Bureau's determination to a referee who, upon hearing, affirmed its determination, and upon subsequent appeal to the appeals council of the Social Security Board, the referee's decision was affirmed. The present suit was brought under § 205 (g) of the Social Security Act. It is not a class suit, but we are advised that it is of major importance as a test case involving the status of thousands of back pay awards ordered by the National Labor Relations Board to illegally discharged employees throughout the country.

Section 2 (d) of the National Labor Relations Act [49 Stat. L. 453 (1935)] defines an employee as:

"Any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

Section 10 (c) of the Act authorizes the Labor Board, in addition to issuing cease and desist orders directed to employes guilty of unfair labor practices, to command "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Section 209 (a) of the Social Security Act defines "wages," for the purpose of the Old Age and Survivors Program, to mean "all remuneration for employment." Section 209 (b) defines "employment" as "any service, of whatever nature, performed by an employee for the person employing him." The basis for the Board's decision, therefore, is that notwithstanding the definition of an employee in the National Labor Relations Act, back pay awarded by the National Labor Relations Board is not remuneration for service performed within the meaning of the Social Security Act, for the illegally discharged employee performs no service for his employer and the award, therefore, is not wages within the purview of the latter Act; that though the effect
56 of an award of back pay may be to give the employee the same amount of money as he would have received had service been performed, it is not given him as wages.

In addition to justifying its decision by the letter of the Act, the Board suggests administrative difficulties in treating back pay as current wages during the period of unlawful discharge. It says that back pay is, of necessity, awarded and paid in quarters subsequent to those in which the individual was without work, and inasmuch as § 209 (g) of the Act defines quarters of coverage as calendar quarters, an individual could only count as a quarter of

coverage the calendar quarter in which the award was paid. This suggestion may easily be dismissed. If, upon consideration of the great humanitarian purpose of the Social Security Act in all of its aspects, it should be found that there is no statutory imperative that unlawfully discharged employees be denied its benefits, administrative difficulties in treating subsequently paid compensation as currently received wages are but meager support for the position of the Board. That such difficulties are not insuperable is demonstrated by its practice in crediting to the employee the differential between wages paid and the legal minimum under the Fair Labor Standards Act when payment is made in pursuance of an administrative order or a court decree.

The basic problem does not, however, yield to such simple solution, and difficulty is enhanced by the construction put upon back pay by other administrative agencies. The Commissioner of Internal Revenue, it is said, has held that back pay does not constitute wages within the meaning of Titles VIII and IX of the Social Security Act, and that the amounts paid were "on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services." So the Labor Board has held that there need be no withholding from back pay for Social Security taxes. Pennsylvania Furnace & Iron Co., 13 N. L. R. B., 49, 55–56. Back pay has been held deductible for income tax purposes as an ordinary and necessary expense, but in a decision rendered October 15, 1942, the Comptroller General has ruled that a back pay settlement, before entry of a Labor Board order, was not a reimbursable item of cost under a cost-plus-fixed-fee contract. Resulting from the fault of the employer, the item could not be shifted to the government. It is therefore argued that consistency of construction by administrative agencies should not be disturbed by the courts under the doctrine applied in Brewster v. Gage, 280 U. S., 327, 336; Fawcus Machine Co. v. U. S., 282 U. S. 375, 378; Norwegian Nitrogen Co. v. U. S., 288 U. S. 294, 315. But the statutes here involved are of such recent enactment, and the problem relatively so new, that we may well doubt that administrative construction is now so crystallized and frozen into the law that it should escape the consideration of courts, or that the failure of a Congress, absorbed in implementing the most colossal war effort of all time, to amend or clarify the Act, implies agreement with administrative interpretation of the legislative purpose.

To the man in the street or at the bench or machine, "wages" and "pay" are undoubtedly synonymous, and "back pay" suggests pay currently earned even though not currently received. This

accords with dictionary definitions. Webster's International Dictionary defines "pay" as "remuneration, wages, salary," and "wages" as synonymous with "pay."

But it is said by the Board that the incidents and characteristics of an award of back pay are such that it is more appropriately classified as in the nature of damages and reparation for loss than as remuneration for service performed; that the concept of back pay does not fit into the pattern for wages established in Title II of the Social Security Act and in the corresponding provisions of the Federal Insurance Contribution Act; that wages are tied to service performed, whereas back pay, like damages, is intended merely to put the worker in as good condition as he would have been but for the unlawful conduct of his employer. Back pay, it is urged, is compensatory, and it is untenable to hold it to be wages upon some theory of constructive earnings, or by resort to a fiction, or to so classify it by judicial fiat. Wages are not, however, always earned by the expenditure of physical or mental effort on the part of the employee. This the Board recognizes when it includes within the term "wages," vacation pay, sick and disability pay, pay while on state National Guard duty, retainer fees to consultants, etc. Social Security Board, Regulations No. 3, §§ 403.827; Social Security Board, Unemployment Compensation Interpretation Service, Federal Series, 1937, 47 SST 49. Instances may be multiplied where wages are paid not for current effort but in consideration of an employer's command of the employee's time, and wages are no less earned when an employee holds himself in readiness to perform, than when he actually performs. "They also serve, who only stand and wait."

This aspect of wages is not without recognition by the courts. In re B. H. Gladding Co., 120 Fed. 709 (D. C. R. I.). The concept that back pay is, by its nature, damages or a penalty, has been expressly rejected. Agwilines v. N. L. R. B., 87 Fed. (2d) 146 (C. C. A. 5); Republic Steel Corp. v. N. L. R. B., 311 U. S. 7. The power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197. The concept of back pay in the National Labor Relations Act, as it has been developed in innumerable decisions of the Supreme Court and the several Courts of Appeal, is that it is a remedial device to restore the employee, in all respects, to a status extant prior to his unlawful discharge, and so associated are the terms "wages" and "back pay" that they are often used interchangeably by courts, as witness the separate opinion of Mr. Justice Black and Mr. Justice Douglas in the Republic Steel Case, supra. The "make whole" objective of the back pay order has been construed so that the employee is entitled, upon reinstatement,

not only to the wages he would have earned, but to all other rights that would have accrued to him by reason of his employment had he not been unlawfully discharged. These have been held to include insurance rights, vacation rights, and seniority status. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1; Republic Steel Corp., v. N. L. R. B., supra; Republic Steel Corp. v. N. L. R. B., 114 Fed. (2) 820; Third Annual Report of National Labor Relations Board, page 209. In Labor Board v. Waterman S S Co., 309 U. S. 206, 218, it was said, "In the words of the Act, an employer cannot terminate his employees' tenure of employment, or any term or condition of employment because of union activity or affiliation. * * * They embrace, as well, all elements of the employment relationship which in fact customarily attended employment. * * *"

We are asked to hold that of the rights of an unlawfully discharged employee protected by the Labor Act, all may be preserved, by administrative order, except the single right which in the exegencies of a post-war period may be the most important, and this on the ground that its preservation is precluded by a definition of employment as "service of whatever nature performed by an employee for the person employing him." The continuity of the employment relationship between an employer and his unlawfully discharged employee, under the National Labor Relations Act, is not denied. The right to compensation equal to wages is not denied. The point stressed is that the Act requires service, with connotation given to that term, so that it applies only when some physical or mental effort is expended by the employee on behalf of the employer. But "service" is not so or otherwise
59 defined. The Congress was concerned primarily with compensation as a yard-stick for both employer and employee contributions. If wages were paid they measured both the tax and the excise. Clearly it was not a condition contributing to either the humanitarian or economic purpose of the Act to determine whether the wages were earned or how. It is pointed out persuasively, we think, by Michael Fooner, formerly Associate Administrative Analyst for the Board, in 41 Michigan Law Review, 60, that if this extreme view were accepted it would place upon the Social Security Board an administrative burden, unique in character and far flung in its implications, and this, we think, is important. If services performed in the asserted meaning of that phrase, is a statutory element in the concept of wages, must there not then be an inquiry in every case as to whether the wages were earned by service? Admitting a contract of employment, an obligation to pay, and the liquidation of the obligation by payment, are the benefits of the Act not to be denied under the reason-

ing of the Board when no labor is performed? Tested by reductio ad absurdum, its construction may not stand.

It is a familiar principle that we may look to the whole Act to ascertain the precise meaning of any of its provisions. We turn to an analysis of the Social Security Act in Helvering v. Davis, 301 U. S 619. There we find that Title VIII applies to different types of tax—an income tax on employees, and an excise tax on employers. The income tax on employees is measured by wages paid during the calendar year (§ 801). The excise tax on the employer is to be paid "with respect to having individuals in his employ," and like the tax on employees is measured by wages (§ 804). In the computation of wages all remuneration is to be included except so much as is in excess of $3,000 [§ 811 (a)]. The income tax on employees is to be collected by the employer who is to deduct the amount from the wages "as and when paid" [§ 802 (a)]. These provisions speak in terms of a standard applied to remuneration paid to the employee in pursuance of an employment contract, or as the result of an employer-employee relationship, whenever received or however paid. The Social Security tax on the employee is a tax on income. If income, under the Internal Revenue Laws, is it not equally income under the Social Security Law?

When we give consideration to the rationalization in Helvering v. Davis, supra, by which the power of Congress to enact the Social Security Act under the General Welfare Clause, was sustained, the reasoning that the award of old age benefits was in response

> to a problem national in area and dimensions, to save men
60 and women from the rigors of poverty and the haunting
> fear that such a lot awaits them, and when we consider that its enactment followed hard upon the passage of the National Labor Relations Act, and that both were the result of a coordinated national labor policy designed to mitigate the hardships of an economic crisis which impelled the adoption of both, it seems inconceivable that the Congress, in its concurrent endeavor to prevent labor strife and preserve the continuity and stability of labor remuneration, could have intended that Social Security benefits should be denied to a large class of employees reasonably expected to come into existence by virtue of the remedial provisions of the National Labor Relations Act, and this by a definition of employment which, as now sought to be interpreted, is in conflict with its meaning in the earlier statute, unrealistic in the light of human experience, and may well have been purely fortuitous.

We are told that the Labor Board has not attempted to characterize back pay as wages within the meaning of the Social Security Act, nor, assuming feasibility and jurisdiction to enter such an order, has it found that creditability as wages under the Social Security Act is necessary to effectuate the purposes of the Labor Act

generally, or in the particular situation giving rise to this appeal. That may be so, but that the Labor Board has not conceived of back pay as wages, is not so. In N. L. R. B. v. Killoren, 112 Fed. (2d) 609 (C. C. A. 8), the Labor Board, as plaintiff, in its role as trustee for employees entitled to back pay, succeeded in obtaining an adjudication that a back pay award constituted wages in the payment of which employees were entitled to the priority accorded employees under § 64 of the Bankruptcy Act, 11 U. S. C. A. 104. The court there rejected the notion that a back pay award was an allowance in the nature of damages, and, basing its decision upon a determination that Congress had specifically designated the allowance as back pay in a continued employment status, held that this sufficiently constituted the award as wages earned "to eliminate legal shadows."

The Congressional concept of back pay as current wages in a continuous employment relationship, is now illuminated by § 119 of the Revenue Act of 1943, amending § 107 by adding subsection (d) under which employees may allocate back pay awards over the period of discharge, and file amended income tax returns to include back pay as income for the years it would have been received, but for the unlawful discharge. The concept is not
destroyed but emphasized and clarified (so as to avoid
61 a construction equivalent to that here made) by distinguishing back pay from wages generally.

The National Labor Relations Act is designed to secure to employees their right freely to organize and designate bargaining agents. Discharge for activity in the exercise of such right is declared to be an unfair labor practice, empowering the administrative agency to take such affirmative action as will effectuate the policies of the Act. This includes a restoration of the employee to his original status without impairment of any right originally possessed. We may not say that rights, the exercise of which it is national policy to encourage, may be exercised only at the peril of surrendering rights under other social legislation created for the protection of the same persons. It is true that the surrender is only for the duration of the unlawful discharge and that in many cases the credit for both income and excise percentages will be small. The principle is, however, important. Rights which the Labor Act protects are not by the Social Security Act destroyed. We agree with Fooner, supra, that this would be allowing principles of the Social Security Act to be thwarted by an employer's illegal act, and that it is precisely against the effects of such acts that national labor and social legislation has been created.

Judgment reversed and the cause remanded for further proceedings in conformity herewith.

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

[Endorsement on cover:] File No. 50021. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 318. The Social Security Board, Petitioner vs. Joseph Nierotko. Petition for a writ of certiorari and exhibit thereto. Filed August 13, 1945. Term No. 318 O. T. 1945.

U. S. GOVERNMENT PRINTING OFFICE 1945

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	3
Reasons for granting the writ	4
Conclusion	11
Appendix A. Statutes Involved	12
B. Internal Revenue Interpretation	17
C. Letter from Social Security Board	19

CITATIONS

Cases:

Aqueduct, Inc. v. Labor Board, 87 F. 2d 146	6
Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261	6
Fox v. Standard Oil Co., 294 U. S. 87	5
Gray v. Powell, 314 U. S. 402	9
National Hahnemann Hospital Association of D. C. v. Britton, 147 F. 2d 361, certiorari denied May 7, 1945, No. 1124, October Term, 1944	6
National Labor Relations Board v. American Chemical & Potash Corp., 113 F. 2d 232	7
National Labor Relations Board v. Hearst Publications, 322 U. S. 111	9
National Labor Relations Board v. Stockade Carbon Co., 128 F. 2d 188	6
National Labor Relations Board v. Sunshine Mining Co., 125 F. 2d 737	6
National Licorice Co. v. Labor Board, 309 U. S. 350	6
Norwegian Nitrogen Co. v. United States, 288 U. S. 294	9
Pennsylvania Furnace and Iron Co., Matter of, 14 N. L. R. B. 49	9
Phelps Dodge Corp. v. Labor Board, 313 U. S. 177	7
Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7	9
Skidmore v. Swift & Co., 323 U. S. 134	9
Social Security Board v. Warren, 142 F. 2d 971	9
Stewart Die Casting Corp. v. Labor Board, 122 F. 2d 801	6
Trust of Bingham v. Commissioner, No. 402, October Term, 1944, decided June 4, 1945	9

Cases—Continued.	Page
Virginia Electric Co. v. *Labor Board*, 319 U. S. 533	6
Walker v. *Altmeyer*, 137 F. 2d 531	9
Statutes:	
National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*):	
Sec. 2 (3)	7, 15
Sec. 10 (c)	15
Social Security Act (49 Stat. 620, as amended, 53 Stat. 1362, 42 U. S. C. Sec. 301, *et seq.*):	
Sec. 203 (d) (1)	8, 12
Sec. 205 (g)	3
Sec. 209 (a)	4, 12
Sec. 209 (b)	4, 6, 12
Sec. 209 (c)	10, 14
Sec. 209 (g)	8, 10, 14
Miscellaneous:	
I. T. 3412, 1940–2 Cum. Bull. 174	9
S. S. T. 359, 1939–1 Cum. Bull. 305	4, 9, 17
Third Annual Report of the National Labor Relations Board, p. 200	10
22 Comp. Gen. 349	9

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

v.

JOSEPH NIEROTKO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 14, 1945.

OPINIONS BELOW

The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 53) is reported in 149 F. 2d 273. The opinion of the Referee of the Social Security Board, which was adopted by the Appeals Council (R. 11), appears at R. 14–28.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether "back pay" awarded pursuant to Section 10 (c) of the National Labor Relations Act constitutes "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account.

STATUTES INVOLVED

The applicable portions of the Social Security and National Labor Relations Acts are set forth in Appendix A, *infra,* pp. 12–16.

STATEMENT

The basic facts are undisputed. On August 9, 1939, pursuant to Section 10 (c) of the National Labor Relations Act (*infra,* p. 15), respondent, Nierotko, whom the National Labor Relations Board found to have been discharged by the Ford Motor Company for union activity, was ordered reinstated with "back pay" (R. 2, 4, 15–16). The Company, on July 18, 1941, paid to respondent as "back pay" for the period February 2, 1937 to September 25, 1939, the lump sum of $3,501.32 (R. 2, 4, 17). On February 27, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board rejected respondent's re-

quest that the "back pay" be credited to his Old Age and Survivors Insurance Account, the Bureau ruling that "back pay" did not constitute "wages" within the meaning of the Social Security Act (R. 41–42). In accordance with Section 205 (c) (3) of the Social Security Act, respondent then appealed to a referee, who, after hearing, affirmed the Bureau's determination (R. 14–28). The Appeals Council of the Social Security Board affirmed the referee's decision (R. 11).

Thereafter, pursuant to Section 205 (g) of the Social Security Act, respondent instituted a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, to review the decision of the Board (R. 1–3). On August 4, 1944, the district court entered summary judgment in favor of the Board (R. 47–48). On appeal, the United States Circuit Court of Appeals for the Sixth Circuit reversed (R. 53–60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that "back pay" awarded under the National Labor Relations Act constitutes "wages" within the meaning of the Social Security Act.

2. In seemingly holding that respondent is entitled to more than one "quarter of coverage",

as defined by Section 209 (g) (2) of the Social Security Act (*infra*, p. 15), for the "back pay" received, although payment of the "back pay" was made in a lump sum during a single "calendar quarter."

3. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Section 209 (a) of the Social Security Act (*infra*, p. 12) defines "wages" for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b) (*infra*, pp. 12–14) in turn defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed." The Social Security Board, taking the same position as that adopted earlier by the Internal Revenue Bureau (S. S. T. 359, 1939–1 Cum. Bull. 305; Appendix B, *infra*, pp. 17–18) under the taxing provisions of the Social Security Act, held that "back pay" was not "wages," since, during the period covered by the "back pay" order, the discharged employee did not perform any service for the employer. The court below, suggesting (R. 59) that the presence of the word "service" in the definition of employment "may well have been purely fortuitous," held, however, that the rendition of services is not a prerequisite to classifying money payments as "wages" under the Social Security Act. The

court thought a literal construction of the statutory definition inconsistent with the over-all purpose of the old age benefit provisions of the Social Security Act, as well as with the purposes of the National Labor Relations Act. Proceeding on the premise that the "back pay" provision of the National Labor Relations Act undertakes to restore the unlawfully discharged employee to all the rights he would have enjoyed but for his discharge, the court below reasoned that this objective would be defeated *pro tanto* if "back pay" were not treated as "wages," since the discharged individual would then be deprived of certain Social Security benefits he otherwise would have enjoyed. The court therefore, concluded that with the Labor Act and the Social Security Act "the result of an integrated national labor policy," Congress could not have intended that the Social Security Act should deprive the unlawful discharged employee of "rights" protected by the Labor Act.

1. The correctness of the decision below is seriously open to question. Admittedly, if the term "wages" were given its dictionary meaning, it might well include "back pay." However, the Social Security Act expressly defines "wages," and "in such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard*

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	3
Reasons for granting the writ	4
Conclusion	11
Appendix A. Statutes Involved	12
B. Internal Revenue Interpretation	17
C. Letter from Social Security Board	19

CITATIONS

Cases:

Aguilines, Inc. v. *Labor Board*, 87 F. 2d 146	6
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261	6
Fox v. *Standard Oil Co.*, 294 U. S. 87	5
Gray v. *Powell*, 314 U. S. 402	9
National Homeopathic Hospital Association of D. C. v. *Britton*, 147 F. 2d 561, certiorari denied May 7, 1945, No. 1124, October Term, 1944	6
National Labor Relations Board v. *American Chemical & Potash Corp.*, 113 F. 2d 232	7
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	9
National Labor Relations Board v. *Stackpole Carbon Co.*, 128 F. 2d 188	6
National Labor Relations Board v. *Sunshine Mining Co.*, 125 F. 2d 757	6
National Licorice Co. v. *Labor Board*, 309 U. S. 350	6
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	9
Pennsylvania Furnace and Iron Co., Matter of, 13 N. L. R. B. 49	9
Phelps Dodge Corp. v. *Labor Board*, 313 U. S. 177	7
Republic Steel Corp. v. *National Labor Relations Board*, 311 U. S. 7	9
Skidmore v. *Swift and Co.*, 323 U. S. 134	9
Social Security Board v. *Warren*, 142 F. 2d 974	9
Stewart Die Casting Corp. v. *Labor Board*, 132 F. 2d 801	6
Trust of Bingham v. *Commissioner*, No. 932, October Term, 1944, decided June 4, 1945	9

Cases—Continued. Page

Virginia Electric Co. v. Labor Board, 319 U. S. 533 . . . 6

Walker v. Altmeyer, 137 F. 2d 531 . . . 9

Statutes:

National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*):

Sec. 2 (3) . . . 7, 15

Sec. 10 (c) . . . 15

Social Security Act (49 Stat. 620, as amended, 53 Stat. 1362, 42 U. S. C. Sec. 301, *et seq.*):

Sec. 203 (d) (1) . . . 8, 12

Sec. 205 (g) . . . 3

Sec. 208 (a) . . . 4, 12

Sec. 209 (b) . . . 4, 6, 12

Sec. 209 (e) . . . 10, 14

Sec. 209 (g) . . . 8, 10, 14

Miscellaneous:

I. T. 3412, 1940-2 Cum. Bull. 174 . . . 9

S. S. T. 359, 1939-1 Cum. Bull. 305 . . . 4, 9, 17

Third Annual Report of the National Labor Relations Board, p. 200 . . . 10

22 Comp. Gen. 349 . . . 9

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

v.

JOSEPH NIEROTKO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 14, 1945.

OPINIONS BELOW

The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 53) is reported in 149 F. 2d 273. The opinion of the Referee of the Social Security Board, which was adopted by the Appeals Council (R. 11), appears at R. 14–28.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether "back pay" awarded pursuant to Section 10 (c) of the National Labor Relations Act constitutes "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account.

STATUTES INVOLVED

The applicable portions of the Social Security and National Labor Relations Acts are set forth in Appendix A, *infra,* pp. 12–16.

STATEMENT

The basic facts are undisputed. On August 9, 1939, pursuant to Section 10 (c) of the National Labor Relations Act (*infra,* p. 15), respondent, Nierotko, whom the National Labor Relations Board found to have been discharged by the Ford Motor Company for union activity, was ordered reinstated with "back pay" (R. 2, 4, 15–16). The Company, on July 18, 1941, paid to respondent as "back pay" for the period February 2, 1937 to September 25, 1939, the lump sum of $3,501.32 (R. 2, 4, 17). On February 27, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board rejected respondent's re-

quest that the "back pay" be credited to his Old Age and Survivors Insurance Account, the Bureau ruling that "back pay" did not constitute "wages" within the meaning of the Social Security Act (R. 41–42). In accordance with Section 205 (c) (3) of the Social Security Act, respondent then appealed to a referee, who, after hearing, affirmed the Bureau's determination (R. 14–28). The Appeals Council of the Social Security Board affirmed the referee's decision (R. 11).

Thereafter, pursuant to Section 205 (g) of the Social Security Act, respondent instituted a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, to review the decision of the Board (R. 1–3). On August 4, 1944, the district court entered summary judgment in favor of the Board (R. 47–48). On appeal, the United States Circuit Court of Appeals for the Sixth Circuit reversed (R. 53–60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that "back pay" awarded under the National Labor Relations Act constitutes "wages" within the meaning of the Social Security Act.

2. In seemingly holding that respondent is entitled to more than one "quarter of coverage",

as defined by Section 209 (g) (2) of the Social Security Act (*infra*, p. 15), for the "back pay" received, although payment of the "back pay" was made in a lump sum during a single "calendar quarter."

3. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Section 209 (a) of the Social Security Act (*infra*, p. 12) defines "wages" for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b) (*infra*, pp. 12–14) in turn defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed." The Social Security Board, taking the same position as that adopted earlier by the Internal Revenue Bureau (S. S. T. 359, 1939–1 Cum. Bull. 305; Appendix B, *infra*, pp. 17–18) under the taxing provisions of the Social Security Act, held that "back pay" was not "wages," since, during the period covered by the "back pay" order, the discharged employee did not perform any service for the employer. The court below, suggesting (R. 59) that the presence of the word "service" in the definition of employment "may well have been purely fortuitous," held, however, that the rendition of services is not a prerequisite to classifying money payments as "wages" under the Social Security Act. The

court thought a literal construction of the statutory definition inconsistent with the over-all purpose of the old age benefit provisions of the Social Security Act, as well as with the purposes of the National Labor Relations Act. Proceeding on the premise that the "back pay" provision of the National Labor Relations Act undertakes to restore the unlawfully discharged employee to all the rights he would have enjoyed but for his discharge, the court below reasoned that this objective would be defeated *pro tanto* if "back pay" were not treated as "wages," since the discharged individual would then be deprived of certain Social Security benefits he otherwise would have enjoyed. The court therefore, concluded that with the Labor Act and the Social Security Act "the result of an integrated national labor policy," Congress could not have intended that the Social Security Act should deprive the unlawful discharged employee of "rights" protected by the Labor Act.

1. The correctness of the decision below is seriously open to question. Admittedly, if the term "wages" were given its dictionary meaning, it might well include "back pay." However, the Social Security Act expressly defines "wages," and "in such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard*

Oil Co., 294 U. S. 87, 96; *National Homeopathic Hospital Association of D. C.* v. *Britton*, 147 F. 2d 561 (App. D. C.), certiorari denied May 7, 1945, No. 1124, October Term, 1944.

As noted, *supra*, p. 4, the term "wages" is defined in the Social Security Act as remuneration for "service performed," a phrase repeatedly emphasized in the statutory definition.[1] Clearly, respondent did not actually perform any service for the Ford Motor Company during the "back pay" period, and the "back pay" received was not paid as remuneration for service performed. The decisions of the courts reveal that an award of "back pay" is merely an incident to the protection of a public right. *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362; *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, 543; *Agwilines, Inc.* v. *Labor Board*, 87 F. 2d 146 (C. C. A. 5).[2] The employee is bound by the determination of the Board; he cannot institute proceedings to enforce the Board's order or the court's decree entered upon the Board's petition; nor can he bargain away rights given him by the order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *Stewart Die Casting*

---

[1] Section 209 (b), 42 U. S. C., Sec. 409 (b); Appendix A, *infra*, pp. 12–14.

[2] Prior to actual receipt of the money, the employee has no property in the award and an assignment or attachment by creditors is ineffective. *Labor Board* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3); *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C. C. A. 9).

Corp. v. *Labor Board*, 132 F. 2d 801 (C. C. A. 7); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 113 F. 2d 232 (C. C. A. 9). Thus, while "back pay" may be the equivalent of what the employee would have earned, it is not remuneration for his services but a device for vindicating a public right.

The court below, giving no effect to the express requirement of the Social Security Act for performance of service, stressed the Social Security Board's recognition of vacation pay, sick pay, and disability pay as "wages." But, manifestly in all such cases, the payments are voluntary and made in consideration of past or anticipated services, conditions clearly absent in the case of "back pay." Indeed, "back pay" may even be awarded to a person who has never actually been in the employ of the employer. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177. See Section 2 (3) of the Labor Act; Appendix A, *infra*, p. 15.

In holding that respondent should be made whole with respect to his employment, the court below seemingly implied (R. 55, 59) that the Social Security Board must apportion the "back pay" over the entire "back pay" period. Such a result would seem to conflict with the provisions of the Act which base the amount of an individual's benefits upon the number of calendar quarters in which he has been "paid" wages not less

than fifty dollars,[3] inasmuch as the "back pay" in the instant case was all paid in a single calendar quarter.

Such an apportionment also would impose an additional administrative burden on the Social Security Board.[4] The court below was mistaken in declaring (R. 55) that the Board makes similar apportionment with respect to wage awards under the Fair Labor Standards Act.[5]

Apart from the foregoing considerations, the correctness of the decision below is also questionable for failure to accord adequate weight to the

---

[3] See 209 (g) (2); Appendix A, *infra*, p. 14.

[4] Since "back pay" normally is only received long after the "back pay" period, there would be the initial problem of adjusting the Board's records for past years. This feature aside, however, considerable difficulty would be presented in allocating "back pay" to particular calendar quarters, in those cases where the "back pay" had been reduced by the Labor Board to account for actual earnings from other employment, unjustifiable refusal to take new employment, or other factors. Again, in cases where the Board paid insurance benefits during the "back pay" period, the Board would be confronted with the problems of recouping, or adjusting the insured's account for, the amounts which the Board would have been authorized under Section 203 (d) (1) of the Act (Appendix A, *infra*, p. 12) to deduct from such benefits had the "wages" been currently received.

[5] There is set forth in Appendix C, *infra*, p. 19, a letter from the General Counsel of the Federal Security Agency in which he states that the administrative practice of the Social Security Board is to consider payment of such awards under the Fair Labor Standards Act as wages at the time they are actually paid by the employer and not to credit them as wages for the periods in which the services were performed.

uniform administrative interpretation of the Social Security Act. S. S. T. 359, 1939–1 Cum. Bull., 305 (Appendix B, *infra*, pp. 17–18); I. T. 3412, 1940–2 Cum. Bull., 174; *Matter of Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 55–56; cf. 22 Comp. Gen. 349. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift and Co.*, 323 U. S. 134, 139–140. Indeed, it may be that the decision of the Social Security Board in the instant case should be treated as conclusive, since it clearly has warrant in the record and a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *Gray* v. *Powell*, 314 U. S. 402; *Walker* v. *Altmeyer*, 137 F. 2d 531 (C. C. A. 2); *Social Security Board* v. *Warren*, 142 F. 2d 974 (C. C. A. 8). But cf. *Trust of Bingham* v. *Commissioner*, No. 932, October Term, 1944, decided June 4, 1945.

2. While strict application of the language of the Social Security Act would seem to preclude the classification of "back pay" as "wages," a contrary result may be permissible if, as the court below suggested, emphasis is placed on the general purposes of the Social Security Act and if the Social Security Act and the Labor Act are to be viewed as expressions of "an integrated national labor policy" and interpreted as if they were *in pari materia*. For, under the Labor Act, the "back pay" order in one aspect has been conceived to be a device for "making whole" unlawfully discharged employees. Cf. *Republic Steel*

Corp. v. *National Labor Relations Board*, 311 U. S. 7; *Third Annual Report of the National Labor Relations Board*, p. 200. This objection would be partially frustrated if "back pay" were not classified as "wages" under the Social Security Act, since the employee would be denied certain Social Security benefits he would have enjoyed but for his unlawful discharge.[6] As the court below observed (R. 60), this would mean that "rights, the exercise of which it is national policy to encourage, may be exercised only at the peril of surrendering rights under other social legislation created for the protection of the same persons."

Regardless, however, of the correctness of the decision below, it is of sufficient importance to the administration of the Social Security Act, the Federal Insurance Contributions Act, and the National Labor Relations Act to merit review by this Court. The court below noted that the case was "of major importance as a test case involving the status of thousands of back pay awards ordered by the National Labor Relations Board to illegally discharged employees throughout the country" (R. 54). During the period 1939–1945, 30,078 individuals received "back pay" pursuant to orders of the National Labor Relations Board

[6] The benefits lost comprise quarters of coverage which otherwise might contribute toward making him a "fully insured individual" (Sec. 209 (g)) and the quantum of the primary insurance benefit which, in turn, depends on the amount of wages received (Sec 209 (e)). See Appendix A, *infra*, pp. 14–15.

totalling $8,631,298.[7] Until the question here presented is finally settled by this Court, the social security status of these thousands of individuals and the liability of employers for social security taxes on "back pay" will remain in doubt. The Bureau of Internal Revenue does not regard the decision below as controlling, since no other circuit has yet ruled on the question, and a change in the Bureau's ruling would be subject to challenge by employers resisting the collection of taxes on "back pay." The Social Security Board, therefore, finds itself in an awkward position, for, if the Board should follow the decision below, the Board would be paying benefits to a large number of persons in cases where no taxes had been collected. Contrawise, should the Board refuse to follow the decision below in other circuits, the Board would be subjected to a flood of litigation to compel wage credits for "back pay."

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

AUGUST 1945.

---

[7] The above statistics, supplied by the Labor Board, only include cases which the Board considers as closed. We are advised by the Board that in three cases not yet formally closed, it is estimated that some 8,000 additional individuals have already received over $3,000,000 in "back pay."

APPENDIX A

STATUTES INVOLVED

1. Title II of the Social Security Act (49 Stat. 622, as amended, 53 Stat. 1362, 42 U. S. C. Sec. 401 *et seq.*) provides in part as follows:

> SEC. 203. *Reduction and increase of insurance benefits.* * * *
>
> (d) Deductions, in such amounts and at such time or times as the Board shall determine, shall be made from any payment or payments under this title to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits for any month in which such individual:
>
> (1) rendered services for wages of not less than $15; or
>
> * * * * *
>
> SEC. 209. *Definitions.*
>
> When used in this title—
>
> (a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *
>
> (b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irre-

spective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed or in connection with a vessel not an American vessel by an employee, if the employee is employed on and in connection with such vessel when outside the United States;

(6) Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1410 of the Internal Revenue Code by virtue of any other provision of law;

(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1410 of the Internal Revenue Code;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; * * *.

* * * * *

(e) The term "primary insurance benefit" means an amount equal to the sum of the following—

(1) (A) 40 per centum of the amount of an individual's average monthly wage if such average monthly wage does not exceed $50, or (B) if such average monthly wage exceeds $50, 40 per centum of $50, plus 10 per centum of the amount by which such average monthly wage exceeds $50 and does not exceed $250, and

(2) an amount equal to 1 per centum of the amount computed under paragraph (1) multiplied by the number of years in which $200 or more of wages were paid to such individual. Where the primary insurance benefit thus computed is less than $10, such benefit shall be $10.

* * * * *

(g) The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in

which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (h) of this section, the term "quarter" and the term "calendar quarter" mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term "quarter of coverage" means a calendar quarter in which the individual has been paid not less than $50 in wages. * * *

* * * * *

2. The National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*) provides in part as follows:

SEC. 2. *Definitions.*

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 10 (c). * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

APPENDIX B

INTERNAL REVENUE INTERPRETATION

S. S. T. 359, 1939–1 Cum. Bull. 305 of the Bureau of Internal Revenue, reads in part as follows:

> Advice is requested whether payments made to employees of the M Company, who had been discharged and who were reinstated pursuant to an order issued by the National Labor Relations Board, constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.
>
> * * * * *
>
> As indicated above, for purposes of the National Labor Relations Act, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment". However, it does not follow that the sum of money paid to that individual upon reinstatement pursuant to an order of the Board constitutes *remuneration for services performed by an employee for his employer* for the purpose of the taxing provisions of the Social Security Act. Such employee has actually performed no services for which such payments are made, and the employer has done all within his power to terminate the employment relation, at least temporarily. Furthermore, the individual has no right

to demand any compensation from the employer for that period, and it is within the discretion of the Board to decide whether reinstatement shall be with or without back pay, depending on the circumstances in the particular case.

* * * * *

It is held that the payments in question made to employees of the M Company do not constitute *remuneration for services performed by an employee for his employer*, but are payments to the employees on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services to the M Company. Accordingly, such payments do not constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

APPENDIX C

LETTER FROM SOCIAL SECURITY BOARD

FEDERAL SECURITY AGENCY,
WASHINGTON, *August 8, 1945.*

SOLICITOR GENERAL OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

Re: *Joseph Nierotko* v. *Social Security Board* (United States Circuit Court of Appeals, Sixth Circuit, Civil No. 9896).

DEAR SIR: Reference is made to the opinion of the Circuit Court of Appeals in the above-entitled case in which it has been held that back pay awarded to an employee by the National Labor Relations Board constitutes "wages" within the meaning of the Social Security Act. We have been informed that in preparing your brief for application for writ of certiorari with the Supreme Court of the United States, you have been disturbed by the statement in the opinion, "That such difficulties are not insuperable [administrative difficulties in treating back pay as current wages during the period of unlawful discharge] is demonstrated by its [the Board's] practice in crediting to the employee the differential between wages paid and the legal minimum under the Fair Labor Standards Act when payment is made in pursuance of an administrative order or a court decree." You have inquired to ascertain how,

in fact, the Social Security Board does credit such payments to the wage record of an employee.

We wish to point out, first, that payments ordered by the Wage and Hour Division of the Department of Labor represent the difference between wages paid by an employer for services rendered and the legal minimum wage payable under the Fair Labor Standards Act for services rendered. In considering such payments as "wages" the Social Security Board has always recognized that they are granted as remuneration for service and hence fall within the definition of "wages" in section 209 (a) of the Social Security Act, as amended.

Although such payments are "wages," the Social Security Board has not credited them to the wage records of the employees in the manner suggested by the court in its opinion. They are not credited to the periods for which they are paid or in which the services were performed. Under the provision of section 209 (g) of the Social Security Act, as amended, a quarter of coverage is a calendar quarter during which "wages" of not less than $50 are paid. Under the present terms of the Act, these payments are considered to be wages paid at the time when the employer actually pays over the money pursuant to administrative order or court decree.

We deem it advisable, however, to call to your attention that for purposes of deductions from benefit payments to beneficiaries, wage payments ordered pursuant to the provisions of the Fair Labor Standards Act will cause deduction for the month in which the beneficiary rendered services

when the bonus payment, together with amounts received for such services in that month, are equal to wages of more than $14.99. If the amount paid in any such month, together with the back wages allocable thereto, is in excess of $14.99, deductions under either section 203 (d) or section 203 (e) of the Social Security Act, as amended, are required. Allocation in this instance is necessitated by the language of the Act which reads: "* * * for any month in which such individual: (1) rendered services for wages of not less than $15; * * *."

We trust that this information will be of assistance to you.

Sincerely yours,

JACK B. TATE,
General Counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1949

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Summary of argument	4
Argument	5
The Social Security Board properly ruled that "back pay" awarded under the National Labor Relations Act is not "wages" within the meaning of the Social Security Act	7
1. The language of the Act	7
A. Definition of "wages"	7
B. Definition of "quarter of coverage"	10
2. The administrative construction of the Act	15
3. The nature of a "back pay" order	18
4. The purposes of the Social Security and the National Labor Relations Acts	23
Conclusion	26
Appendix A	27
Appendix B	32
Appendix C	34
Appendix D	37

CITATIONS

Cases:

Aguilines, Inc. v. *Labor Board*, 87 F. 2d 146	19
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261	20
Better Business Bureau v. *United States*, No. 52, this term, decided November 13, 1945	17
C. G. Conn, Ltd., Matter of, 10 N. L. R. B. 438	21
Consolidated Edison Co. v. *Labor Board*, 305 U. S. 197	20
Crossett Lumber Co., Matter of, 8 N. L. R. B. 440	12
Emery Bird Thayer Dry Goods Co. v. *Williams*, 98 F. 2d 166	8
Emlen v. *Social Security Board*, 148 F. 2d 927	11
Estate of Sanford v. *Commissioner of Internal Revenue*, 308 U. S. 39	8, 16

674848—45——1

Cases—Continued.

	Page
Fox v. *Standard Oil Co.*, 294 U. S. 87	8
Grace Co., the, Matter of, 7 N. L. R. B. 706	11
Gray v. *Powell*, 314 U. S. 402	17
E. R. Haffelfinger Co., Matter of, 1 N. L. R. B. 760	21
Helvering v. *Davis*, 301 U. S. 619	24
Labor Board v. *American Potash & Chemical Corp.*, 113 F. 2d 282	20
Labor Board v. *Hearst Publications*, 322 U. S. 111	17
Labor Board v. *Killoren*, 122 F. 2d 609, certiorari denied, 314 U. S. 696	22
Labor Board v. *Newark Morning Ledger Co.*, 120 F. 2d 262, certiorari denied, 314 U. S. 633	18
Labor Board v. *Stackpole Carbon Co.*, 128 F. 2d 188	20
Labor Board v. *Sunshine Mining Co.*, 125 F. 2d 757	20
Labor Board v. *Waumbec Mills*, 114 F. 2d 226	9
McCoy v. *Remington Rand Inc.*, 262 App. Div. 790, 27 N. Y. Supp. 2d 208	22
McKesson & Robbins, Inc., Matter of, 19 N. L. R. B. 778	21
Manseau v. *United States*, 52 F. Supp. 395	22
Morgan v. *Social Security Board*, 45 F. Supp. 349	11
Mt. Clemens Pottery Co., Matter of, 46 N. L. R. B. 714	21
National Homeopathic Hospital Association of D. C. v. *Britton*, 147 F. 2d 561, certiorari denied May 7, 1945, No. 1124, October Term, 1944	8
National Licorice Co. v. *Labor Board*, 309 U. S. 350	19
Norwegian Nitrogen Co. v. *United States*, 228 U. S. 294	17
Pennsylvania Furnace & Iron Co., Matter of, 13 N. L. R. B. 49	16
Phelps Dodge Corporation v. *Labor Board*, 313 U. S. 177	9, 19, 20, 21
Republic Steel Corporation v. *Labor Board*, 311 U. S. 7	24
Skidmore v. *Swift & Co.*, 323 U. S. 134	17
Social Security Board v. *LaLone*, F. 2d, decided October 25, 1945 (C. C. A. 9)	17
Social Security Board v. *Warren*, 142 F. 2d 974	17
Stewart Die Casting Corporation v. *Labor Board*, 132 F. 2d 801	20
Suspine v. *Compania Transatlantica Centroamericana*, 37 F. Supp. 268	8
Tonra v. *Robins Dry Dock & Repair Co.*, 258 App. Div. 835, 15 N. Y. Supp. 2d 755, aff'd. without opinion, 283 N. Y. 677, 28 N. E. 2d 402	22
Trust of Bingham v. *Commissioner*, 1944 Term, No. 982, decided June 4, 1945	17
United States v. *American Trucking Assns.*, 310 U. S. 534	26
United States v. *Local 807*, 315 U. S. 521	10

Cases—Continued. Page

Virginia Electric Co. v. *Labor Board*, 319 U. S. 533 19

Von Weise v. *Commissioner of Internal Revenue*, 69 F. 2d 439, certiorari denied, 292 U. S. 635 8

Walker v. *Altmeyer*, 137 F. 2d 531 17

Waterman S. S. Corp. v. *Labor Board*, 119 F. 2d 760 20

Statutes:

Act of August 10, 1939 (53 Stat. 1360), sec. 607 7

Bankruptcy Act:

Sec. 64r 22

Fair Labor Standards Act, Sec. 216 (b) (52 Stat. 1069, 29 U. S. C. 216 (b)) 16

Internal Revenue Code:

Sec. 22 (a) 22

Secs. 1400, 1410 7

Chapter 9, subchapter A 7

National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*):

Sec. 2 (3) 9, 30

Sec. 10 (c) 2, 31

Social Security Act of August 14, 1935 (49 Stat. 620) Sec. 901 13

Social Security Act, Title II (49 Stat. 620, as amended, 53 Stat. 1362, 42 U. S. C. Sec. 401, *et seq.*):

Sec. 202 (a) 7

Sec. 203 (d) (1) 7, 14, 27

Sec. 205 (g) 3

Sec. 209 (a) 4, 7, 27

Sec. 209 (b) 4, 7, 9, 27

Sec. 209 (e) 6, 7, 29

Sec. 209 (f) 7

Sec. 209 (g) 4, 6, 7, 11, 12, 29

Sec. 209 (h) 7, 14

New York Labor Law, Thompson, *Consolidated Laws, N. Y.*, Chap. 31, Art. 16, Sec. 592 23

Miscellaneous:

Annual Reports of National Labor Relations Board:

First, p. 129 *et seq* 21

Second, p. 150 *et seq* 21

Third, p. 200, *et seq* 21

Fourth, p. 97 *et seq* 21, 24

Fifth, p. 74 *et seq* 21

Sixth, p. 75 *et seq* 21

Seventh, p. 52 *et seq* 21

Eighth, p. 40 *et seq* 21

Ninth, p. 48 *et seq* 21

C. C. H., Unemployment Insurance Service, State Series, Sec. 1201 and "New Matters" 17

Miscellaneous—Continued

	Page
22 Comp. Gen. 349	16
84 Cong. Rec. 9008	12
H. Rep. No. 615, 74th Cong., 1st Sess	9, 10
H. Rep. No. 728, 76th Cong., 1st Sess	9, 13, 24, 25
S. Rep. No. 628, 74th Cong., 1st Sess	9, 10
S. Rep. No. 734, 76th Cong., 1st Sess	9, 13, 24, 25
Regulation No. 3, Federal Old Age and Survivors Insurance under Title II of the Social Security Act:	
Sec. 403.202	14
Sec. 403.827	9
S. S. T. 350, 1939—1 Cum. Bull. 305	15, 32
S. S. T. 393, 1940—1 Cum. Bull. 213	16
Social Security Yearbook (1941) p. 74	16
48 Yale L. J. 1265 (1939)	20, 21

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

v.

JOSEPH NIEROTKO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SOCIAL SECURITY BOARD

OPINIONS BELOW

The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 41) is reported in 149 F. 2d 273. The opinion of the Referee of the Social Security Board, which was adopted by the Appeals Council (R. 8), appears at R. 11–21.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1945 (R. 40). The petition for a writ of certiorari was filed on August 13, 1945, and was granted on October 8, 1945 (R. 48). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether "back pay" awarded pursuant to Section 10 (c) of the National Labor Relations Act constitutes "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account.

STATUTES AND REGULATION INVOLVED

The applicable portions of the statutes and regulation involved are set forth in Appendices A and B, *infra*, pp. 27–33.

STATEMENT

The basic facts are undisputed.[1] On August 9, 1939, pursuant to Section 10 (c) of the National Labor Relations Act (*infra*, p. 31), respondent, Nierotko, whom the National Labor Relations Board found to have been discharged by the Ford

[1] The court below stated that the Ford Motor Company was withholding 1% of the amount ordered paid to respondent as "back pay," for respondent's Social Security tax should he be successful in this suit. This seems at variance with the statement of respondent's counsel (R. 29) that there had been no such withholding in Nierotko's case.

Motor Company for union activity, was ordered reinstated with "back pay" (R. 1–2, 3, 11–12). The Company, on July 18, 1941, paid to respondent as "back pay" for the period February 2, 1937 to September 25, 1939, the lump sum of $3,501.32 (R. 1, 3, 12–13). On February 27, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board rejected respondent's request that the "back pay" be credited to his Old Age and Survivors Insurance Account, the Bureau ruling that "back pay" did not constitute "wages" within the meaning of the Social Security Act (R. 32–33). In accordance with Section 205 (c) (3) of the Social Security Act, respondent then appealed to a referee, who, after hearing, affirmed the Bureau's determination (R. 11–21). The Appeals Council of the Social Security Board affirmed the referee's decision (R. 8).

Thereafter, pursuant to Section 205 (g) of the Social Security Act, respondent instituted a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, to review the decision of the Board (R. 1–2). On August 4, 1944, the district court entered summary judgment in favor of the Board (R. 37). On appeal, the United States Circuit Court of Appeals for the Sixth Circuit reversed (R. 40–48), holding that "back pay" awarded by the Labor Board, under the National Labor Relations

Act, constituted "wages" under the Social Security Act.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that "back pay" awarded under the National Labor Relations Act constitutes "wages" within the meaning of the Social Security Act.

2. In seemingly holding that respondent is entitled to more than one "quarter of coverage," as defined by Section 209 (g) (2) of the Social Security Act (*infra*, p. 30), for the "back pay" received, although payment of the "back pay" was made in a lump sum during a single "calendar quarter."

3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

Section 209 (a) of the Social Security Act defines "wages," for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b), in turn, defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed." Since "back pay" is not received for "service performed," it does not come within the statutory definition. Furthermore, to allo-

cate "back pay" over the period for which it was awarded, as would be necessary if the employee were to be put in exactly the same position as if he never had been wrongfully discharged, would contravene the provision in the Social Security Act that employees be regarded as having as quarters of coverage only those quarters "in which" they have received more than $50 in "wages." This has been the consistent interpretation by the Social Security Board and the Bureau of Internal Revenue, the bodies entrusted with the administration of the Social Security Act. Judicial decisions characterizing "back pay" under the National Labor Relations Act also support the conclusion that it is not awarded for service rendered. The general purposes of the Social Security Act and the Labor Relations Act would probably be furthered if "back pay" were held to constitute "wages" for Social Security purposes. But we are forced to the conclusion that there was no sufficiently clear manifestation of legislative purpose on this particular problem to warrant disregard of the ordinary meaning of the language of the statute.

ARGUMENT

We asked for certiorari in the instant case primarily because of the public importance of the question involved and the desirability of obtaining an authoritative ruling by this Court. We recognize the desirability from a broad social aspect of

a result that will tend to increase the Old Age and Survivors Insurance benefits to industrial workers who, because of long lay-offs resulting from unfair labor practices of their employers, might otherwise fail to qualify for certain benefits under the Social Security Act (Pet. pp. 9–10). It is our belief, however, that the statutory scheme of the Social Security Act fails to provide for the crediting of "back pay" awarded under the National Labor Relations Act as "wages" and that the matter of achieving the results desired is solely for Congress.

---

[2] As we pointed out in our petition (pp. 10–11) almost 40,000 individuals have been awarded "back pay." It is reasonable to assume that practically all of these individuals are in occupations otherwise subject to the Social Security Act. "Wages" constitute the medium of determining both coverage and the amount of benefit payments. In order to be a fully insured individual at the age of 65 or at his death, that individual must have had "not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one" or "at least forty quarters of coverage." § 209 (g), *infra*, p. 30. A quarter of coverage is a calendar quarter within which the individual has received not less than $50 in "wages." *Ibid.* The primary insurance benefit (§ 209 (e)) is calculated by taking 40% of an individual's average monthly wage up to $50 and 10% of the remaining amount up to $250, plus an amount equal to 1% of the foregoing amount multiplied by the number of years in which $200 or more in "wages" were paid to such individual. Instances are occurring where an individual fails to qualify for primary insurance benefits as a fully insured individual because of the lack of as little as one or two quarters of coverage. The importance to such individuals of having "back pay" treated as "wages" is clear.

THE SOCIAL SECURITY BOARD PROPERLY RULED THAT "BACK PAY" AWARDED UNDER THE NATIONAL LABOR RELATIONS ACT IS NOT "WAGES" WITHIN THE MEANING OF THE SOCIAL SECURITY ACT

I. THE LANGUAGE OF THE ACT.

A. DEFINITION OF "WAGES"

An individual's rights to benefits under the Social Security Act are defined basically in terms of his employment and "wages."[3] Section 209 (a) of the Social Security Act (*infra*, p. 27) defines "wages," for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b) (*infra*, pp. 27–29), in turn, defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed."[4] The Social Security Board,

[3] "Wages" are of fourfold significance in the Old Age and Survivors Insurance Program, for they affect: (1) eligibility for benefits (Secs. 202 (a), 209 (g), 209 (h); (2) the amount of benefits payable (Sec. 209 (e) and (f)); (3) the amount of taxes to be paid to support the program (26 U. S. C. 1400, 1410); and (4) the amount of benefits to be withheld from those individuals thought not to be in need of benefits (Sec. 203 (d) (1)).

[4] The identical definition is contained in the correlative taxing provisions of the Act found in Titles VIII and IX of the original Act, which related to Old Age Benefits and unemployment compensation, respectively, and later incorporated into the Internal Revenue Code as Chapter 9, Sub-Chapter A (53 Stat. 175). The taxing provisions for the Old Age and Survivors Insurance program were given the name "Federal Insurance Contributions Act" by Sec. 607 of the Social Security Act Amendments of 1939, 53 Stat. 1387.

taking the same position as that adopted earlier by the Internal Revenue Bureau under the taxing provisions of the Act, held that "back pay" awarded under the National Labor Relations Act was not "wages" within the meaning of the Old Age and Survivors Insurance provisions of the Act (R. 32–33).

The Board's ruling clearly was required by the letter of the statute. If the term "wages" were undefined in the Act, it might well be given its dictionary meaning (R. 43–44) and include "back pay." However, the Act expressly defines "wages," and "in such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *National Homeopathic Hospital Association of D. C.* v. *Britton*, 147 F. 2d 561 (App. D. C.), certiorari denied May 7, 1945, No. 1124, October Term, 1944.[5] Congress has defined "wages" as "remuneration for service performed." And since respondent did not actually perform any service for the Ford Motor Company during the "back

[5] See also: *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 48; *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F. 2d 166, 170 (C. C. A. 8); *Von Weise* v. *Commissioner of Internal Revenue*, 69 F. 2d 439, 441 (C. C. A. 8), certiorari denied, 292 U. S. 655; *Suspine* v. *Compania Transatlantica Centroamericana*, 37 F. Supp. 268, 271 (S. D. N. Y.).

pay" period, the "back pay" which he received could not properly be classified as "wages."

The court below, seeking to find compliance with the requirement for "service," stressed (R. 44) the Social Security Board's recognition of vacation pay, sick pay, and disability pay as "wages."* But, manifestly in all such cases, the payments are voluntary and made in consideration of past or anticipated services, conditions clearly absent in the case of "back pay." Indeed, "back pay" may even be awarded to a person who has never actually been in the employ of the employer. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177; *Labor Board;* v. *Waumbec Mills,* 114 F. 2d 226 (C. C. A. 1). See Section 2 (3) of the Labor Act, Appendix A, *infra,* pp. 30–31.

Nor is the suggestion of the court below (R. 46) that the statutory requirement of "service" "might well be fortuitous", persuasive. We know of nothing in the Act or its legislative history to support this view. The phrase "service performed" appears no less than twenty-five times in the definition of "employment" (see Sec. 209 (b), Appendix A, *infra,* pp. 27–29) and is repeatedly employed in the legislative history of the Act. H. Rep. No. 615 (74th Cong. 1st Sess.) p. 21; S. Rep. No. 628 (74th Cong. 1st Sess.) pp. 33, 44; H. Rep. No. 728 (76th Cong. 1st Sess.) pp. 45–49; S. Rep. No. 734 (76th Cong. 1st Sess.) pp. 55–59.

* Regulation No. 3, Federal Old Age and Survivors Insurance under Title II of the Social Security Act, Sec. 403.827.

Moreover, both the House and Senate Committees reporting on the bill pointed out that "the benefits to be paid are related to the wages *earned*" and spoke of "wages" as being "payments made to the employee for *work done*."[7] H. Rep. No. 615 (74th Cong. 1st Sess.) pp. 6, 21, 32; S. Rep. No. 628 (74th Cong. 1st Sess.) pp. 7, 32. In these circumstances, it is apparent that the requirement of "service" appears in the Act by design and not by accident and that since respondent did not render any services for the "back pay" awarded him, such pay cannot properly be classified as "wages" under the Act.[8]

B. DEFINITION OF "QUARTER OF COVERAGE"

The decision below not only disregards the "service" requirement in the definition of "wages", but seems to conflict with the provisions of the Act defining a "quarter of coverage". To be "fully insured", the Act requires that the individual have a given number of "quarters of coverage", a "quarter of coverage" being defined as a "calendar quarter *in which* the individual has been paid not less than $50 in wages." (Sec. 209

[7] Unless otherwise indicated, all italics in this brief are supplied.

[8] The legislative history and definitions of the Social Security Act distinguish this case from *United States* v. *Local 807*, 315 U. S. 521, 531, 534–36, under the Anti-Racketeering Act, where an "attempt" to procure an employment status and wages therefor was held to be within the statutory exemption relating to payment of wages. The Court observed in that case that the "term 'wage'" is "susceptible of more than one meaning."

(g) (2); Appendix A, *infra*, p. 30.) Since the "back pay" in the instant case was all *paid in* a single calendar quarter, respondent would be entitled to only one quarter of coverage.[8a] Cf. *Morgan* v. *Social Security Board*, 45 F. Supp. 349, 352 (M. D. Pa.); *Emlen* v. *Social Security Board*, 148 F. 2d 927, 928 (C. C. A. 3). The decision below, however, would clearly seem to imply (R. 42–43) that the Board must credit respondent with multiple quarters of coverage, apportioning the "back pay" as if such pay had been currently received "wages."[8b]

Such an apportionment not only conflicts with the language of the Act, but with the intendment

---

[8a] Strictly speaking, inasmuch as the back pay award in the instant case was for more than $3,000, and was made in the third calendar quarter for 1941 respondent would be entitled to two quarters of coverage. See p. 12, *infra*.

[8b] If the decision below does not require such an apportionment, it is internally inconsistent, for its fundamental premise is that an employee, by virtue of the Labor Act, has a right to be "made whole" in his Old Age and Survivors Insurance Benefit status. Respondent here will not be "made whole" unless his "back pay" is apportioned over the same number of quarters in which he would have been paid "wages," had he not been unlawfully discharged.

Even if "back pay" is apportioned over the "back pay" period, the employee is not assured of full restoration to his Old Age and Survivors Insurance Benefit status. Thus, where an unlawfully discharged employee realizes, during the "back pay" period, earnings from an employment exempted from the Social Security Act, the Board normally would order such earnings deducted from the amount of "back pay" to be awarded (see *Matter of The Grage Co.*, 7 N. L. R. B. 766, 777–778), and thereby *pro tanto* reduce the "wage" credits for social security purposes. (cont.)

of Congress as well. This is revealed in the legislative history of the last sentence of Section 209 (g) of the Act. That sentence provides that "In any case where an individual has been *paid in a calendar year* $3,000 or more in wages, each quarter of *such year* following his first quarter of coverage shall be deemed a quarter of coverage * * *." When this provision was introduced on the floor of the Senate by way of amendment, Senator Harrison, Chairman of the Committee reporting out the 1939 amendatory bill explained (84 Cong. Rec. 9008):

> Mr. HARRISON. Mr. President, the change from an annual to a quarterly basis for eligibility *requires that an individual be paid $50 in wages in a quarter for the quarter to be counted toward eligibility.* Wages is a defined term and does not include salary in a year after the first $3,000 is paid. Accordingly, an individual receiving $12,000 a year might, under the definition, have only one quarter of coverage in the year because all the part of his salary which could be counted as wages was *paid in* the first

(cont) In certain cases, "back pay" as "wages" would do more than make an employee whole in his social security status. Thus, where the employee receives earnings from other employment during the "back pay" period, the employee's transportation or other expenses incurred in securing such employment is deducted from such earnings to compute the employee's "net" earnings for that period (*Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 497–498), thereby causing the "back pay" awarded, plus the "wages" actually earned, to exceed the total "wages" the employee would have earned had he not been discharged.

> quarter. Under the amendment he would also have the succeeding three quarters in the year counted as quarters of coverage. * * *

Thus, with the exception of the $3,000 proviso, quarters of coverage clearly were understood to arise only from those quarters in which "wage" payments of $50 or more actually occurred.

Additional support for this view is present in other portions of the legislative materials. As originally enacted, Title IX of the Social Security Act allocated wage payments, not to the period in which they were paid, but to the period for which they were payable. (See § 901 of the Act of August 14, 1935, 49 Stat. 639.) The "attendant difficulties and confusion" in this method, placed a "burden on employers and the administrative authorities alike", and induced the Congress by the Social Security Act Amendments of 1939 (53 Stat. 1360) to change the basis of determining tax liability from "wages payable" to "wages paid" in a calendar year. H. Rep. No. 728 (76th Cong., 1st Sess.), p. 62; S. Rep. No. 734 (76th Cong., 1st Sess.), p. 75. Since it was the same amendatory Act that defined a "quarter of coverage" as a calendar quarter "in which" not less than fifty dollars in "wages" are "paid", it is likely that the words "in which" and "paid" were used advisedly. Where Congress wished wage payments to be allocated to periods other than the period in which they were actually paid, it knew

how to use appropriate language. Thus, the same amendatory Act defined a "currently insured" individual as one "with respect to whom it appears to the satisfaction of the Board that he has been paid wages of not less than $50 *for* each of not less than six of the twelve calendar quarters, immediately preceding the quarter in which he died". (Sec. 209 (h)). See Regulation No. 3, Federal Old Age and Survivors Insurance Benefits under Title II of the Social Security Act, Sec. 403.202.

From the foregoing, it is clear that Congress intended to confine quarters of coverage to those quarters in which wage payments of $50 or more actually occurred, regardless of when the services for such payments were rendered, and that apportionment of "back pay" over the entire "back pay" period would conflict with the express terms of the Act.[*]

---

[*] Apportionment of "back pay" over the "back pay" period would also impose an administrative burden on the Social Security Board. Since "back pay" normally is only received long after the "back pay" period, there would be the initial problem of adjusting the Board's records for past years. Moreover, considerable difficulty would be presented in allocating "back pay" to particular calendar quarters, in those cases where the "back pay" had been reduced by the Labor Board to account for actual earnings from other employment, unjustifiable refusal to take new employment, or other factors. Again, in cases where the Board paid insurance benefits during the "back pay" period, the Board would be confronted with the problems of recouping, or adjusting the insured's account for, the amounts which the Board would have been authorized under Section 203 (d) (1) of the

2. THE ADMINISTRATIVE CONSTRUCTION OF THE ACT

In classifying "back pay" as "wages" under the Act, the court below refused to accord weight to the established and uniform administrative construction of the Act, on the ground that the interpretation was new and that Congress was too engrossed in implementing war efforts to amend or clarify the Act (R. 43).

The Board's interpretation of the Act is the same as that taken more than six years ago by the Bureau of Internal Revenue under the taxing provisions of the Act. (S. S. T. 359, 1939—1 Cum. Bull. 305; Appendix B, *infra*, pp. 32–33.) In its ruling, the Bureau stressed the fact that the employee performed no services, that the employer had done his best to terminate the employment relation, that the employee lacked any "right" to demand "back pay" from the employer, and that it is discretionary with the Board whether "back pay" shall be awarded. The Bureau then con-

---

Act (Appendix A, *infra*, p. 27) to deduct from such benefits had the "wages" been currently received.

The court below was mistaken in declaring (R. 43) that the Board makes an apportionment with respect to wage awards under the Fair Labor Standards Act. There is set forth in Appendix C, *infra*, p. 34–36, a letter from the General Counsel of the Federal Security Agency in which he states that the administrative practice of the Social Security Board is to consider payment of such awards under the Fair Labor Standards Act as "wages" at the time they are actually paid by the employer and not to credit them as "wages" for the periods in which the services were performed.

cluded that the amounts paid were "on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services." The consistent administrative practice of the Social Security Board has been the same.[10] In conformity with the rulings of the Internal Revenue Bureau, the Labor Board has held that there need be no withholding from "back pay" of social security taxes which finance the Old Age and Survivors Insurance Program. *Matter of Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 55–56.[11] Cf. Brief for Labor Board, pp. 18–20, *Marshall Field & Co.* v. *Labor Board*, No. 453, October Term, 1942.

We submit that this uniform and established administrative interpretation of the Act "by those who are experts in the field and specially informed as to administrative needs and conveniences" (*Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 46) is entitled to

[10] The Social Security Board, on March 27, 1942, by a minute entry, specifically approved the practice. The Bureau has also ruled that payment of liquidated damages under § 16 (b) of the Fair Labor Standards Act (52 Stat. 1069, 29 U. S. C. 216 (b)) is not "wages" within the meaning of the Social Security Act (S. S. T. 393, 1940—1 Cum. Bull., p. 213). The Social Security Board has taken a like view (1941 Social Security Yearbook, p. 74).

[11] Cf. also 22 Comp. Gen. 349 in which the Comptroller General ruled that a "back pay" settlement before entry of a Labor Board order was not a reimbursable item of cost under a cost-plus-a-fixed-fee contract.

great weight in determining the meaning of the Act. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140.[12] Cf. *Better Business Bureau* v. *United States*, No. 52, this Term, decided November 13, 1945. This is especially true here, for the uniform administrative construction of the Social Security Act has not only resulted in settling the practice of the Social Security Board and the Internal Revenue Bureau under the Old Age and Survivors Insurance Benefit Program, but has been of considerable influence in the administrative construction of the various state unemployment compensation acts. Virtually all of these Acts define "wages" in terms of "remuneration" for "personal services," (see C. C. H. Unemployment Insurance Service, State Series, Sec. 1201), and the great preponderance of the states (some of them expressly referring to the ruling of the Internal Revenue Bureau) have ruled that "back pay" does not constitute "wages" since no services are actually performed by the

[12] Indeed it may be that the decision of the Social Security Board in the instant case should be treated as conclusive since it clearly has warrant in the record and a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *Gray* v. *Powell*, 314 U. S. 402; *Walker* v. *Altmeyer*, 137 F. 2d 531 (C. C. A. 2); *Social Security Board* v. *Warren*, 142 F. 2d 974 (C. C. A. 8); *Social Security Board* v. *LaLone*, decided October 25, 1945 (C. C. A. 9). But cf. *Trust of Bingham* v. *Commissioner*, 1944 Term, No. 932, decided June 4, 1945.

individual during the "back pay" period.[13] In this context, a holding by this Court that "back pay" does not constitute "wages" within the meaning of the Social Security Act would undoubtedly have a serious unsettling effect upon the administration of the state unemployment compensation acts.

3. THE NATURE OF A "BACK PAY" ORDER

The position taken by the Social Security Board and the Internal Revenue Bureau is also in harmony with the judicial authorities delineating the nature of "back pay" under the National Labor Relations Act. "Back pay" is neither remuneration for service performed, nor, as the court below assumed, a remedy for invasion of a right vested in the employee. The decisions of the courts reveal that "back pay" is awarded as an incident to the protection of a public right—the "right to have the channels of interstate commerce freed from obstructions resulting from unfair labor practices". *Labor Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. C. A.

[13] Of the forty-one state agencies (including the District of Columbia) which have expressed their views, some thirty-four have ruled that "back pay" is not "wages": Ala., Calif., Ariz., Conn., D. C., Fla., Ill., Ind., Iowa, Kan., Ky. (semble), La. (semble), Me., Md., Minn., Miss., Mo., Neb., N. H., N. M., N. C., Ohio, Okla., Ore. (semble), Pa., R. I., S. C., S. D., Tenn., Utah, Wash., W. Va., Wisc., Wyo. *Contra:* Ga., Mont., Nev., N. J., N. Y., N. D., Va. See C. C. H. Unemployment Insurance Service, State Series, Sec. 1201, and "New Matters."

3), certiorari denied, 314 U. S. 693; *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362; *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, 543; *Agwilines, Inc.* v. *Labor Board*, 87 F. 2d 146 (C. C. A. 5). As this Court succinctly stated in the *Virginia Electric* case, when sustaining the power of the Board to order reimbursement of amounts checked off as dues to a company union (p. 543):

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. Cf. *Agwilines, Inc.* v. *Labor Board*, 87 F. 2nd 146, 150–151; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177.

Since the "back pay" remedy vindicates public and not private rights, its award is entirely discretionary with the Labor Board. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 198. Moreover, the employee is bound by the determination of the Board; he cannot institute proceedings to

enforce the Board's order or the court's decree entered upon the Board's petition; nor can he bargain away benefits given him by the order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *Stewart Die Casting Corp.* v. *Labor Board*, 132 F. 2d 801 (C. C. A. 7); *Labor Board* v. *American Potash & Chemical Corp.*, 113 F. 2d 232 (C. C. A. 9); *Waterman S. S. Corp.* v. *Labor Board*, 119 F. 2d 760 (C. C. A. 5).[14] While it is true that the Board usually endeavors to make "the workers whole for losses suffered", that is done only as "part of the vindication of the public policy which the Board enforces". *Phelps Dodge Corp.* v. *Labor Board, supra*, at p. 197. The Board primarily is seeking a "remedy" for the conditions created by the unfair labor practice (*Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 236); although its order may involve "compensation for the employee, [that] is not in itself a motivating factor, but merely a consequence incidental to the ideal of carrying out the purposes of the Act". (1939) 48 Yale L. J. 1265.

Accordingly, in fashioning a "back pay" order, the Board may give weight to factors which, although bearing upon the purposes of the Act, reduce the extent of the reparation to the employee for his loss. Thus, in view of "the healthy

[14] Prior to actual receipt of the money, the employee has no property in the award and an assignment or attachment by creditors is ineffective. *Labor Board* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3); *Labor Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C. C. A. 9).

policy of promoting production and employment", the Board may deduct losses which the employee incurred by "unjustifiable refusal to take desirable new employment". *Phelps Dodge Corp.* v *Labor Board,* 313 U. S. 177, 200. Again, delay in filing charges before the Board may be made the basis of a deduction for the period of the delay (*Matter of C. G. Conn, Ltd.,* 10 N. L. R. B. 498), and if a favorable ruling by the trial examiner is reversed by the Board, no "back pay" is ordered for the period when the examiner's report stood unreversed (*Matter of E. R. Haffelfinger Co.,* 1 N. L. R. B. 760). The Board has refused to award "back pay" where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract (*Matter of McKesson & Robbins, Inc.,* 19 N. L. R. B. 778), or where the employee had been guilty of serious misconduct during a strike (*Matter of Mt. Clemens Pottery Co.,* 46 N. L. R. B. 714). Whatever compensation the employee receives, therefore, may be considerably less than his loss in pay, and may be dictated by considerations far removed from the service he would have performed, much less from "service performed".[15]

[15] The practices of the Board in awarding "back pay" are succinctly summarized in *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 198, fn. 7. See also: (1939) 48 Yale L. J. 1265; Annual Reports of the Board, First, p. 129 *et seq.;* Second, p. 150 *et seq.;* Third, p. 200 *et seq.;* Fourth, p. 97 *et seq.;* Fifth, p. 74 *et seq.;* Sixth, p. 75 *et seq.;* Seventh, p. 52; Eighth, p. 40 *et seq.,* Ninth, p. 48 *et seq.*

It is true that several courts have held "back pay" to be "wages", for purposes other than Old Age and Survivors Insurance Benefits. Thus, a divided court has held that "back pay" constitutes "wages" within the meaning of the priority provisions of the Bankruptcy Act.[18] *Labor Board* v. *Killoren*, 122 F. 2d 609 (C. C. A. 8), certiorari denied, 314 U. S. 696. "Back pay" also has been held to be "income derived from * * * wages, or compensation for personal service" within the meaning of Section 22 (a) of the Internal Revenue Code. *Manseau* v. *United States*, 52 F. Supp. 395 (D. Mich.). And in New York, "back pay" has been treated as "wages" for purposes of the State Unemployment Insurance Law. *Tonra* v. *Robins Dry Dock & Repair Co.*, 258 App. Div. 835, 15 N. Y. Supp. 2d 755 (memorandum opinion), affirmed without opinion, 283 N. Y. 676, 28 N. E. 2d 402; *McCoy* v. *Remington Rand Inc.*, 262 App.

[18] Sec. 64a (2) of the Bankruptcy Act accords second priority to "wages * * * earned * * * due to workmen * * *." 11 U. S. C. 104a (2). In the *Killoren* case, the issue before the court was whether, as against creditors, the claims for "back pay" would be given the three months' priority given in bankruptcy proceedings to wage claimants or the preference, unlimited as to time, for debts due to the United States. 11 U. S. C., Sec. 104 (a) (2), (5). To avoid preferential or discriminatory treatment and to achieve equality with other workers' claims, the court, in a split decision, assimilated the claim presented by the Labor Board to one for "wages." In rejecting the Labor Board's contention that the priority should be for a debt owed the United States, the case clearly is no authority for the proposition that "back pay" constitutes remuneration for service performed.

Div. 790, 27 N. Y. Supp. 2d 298 (memorandum opinion). Both the *Killoren* and *Manseau* cases clearly are inapplicable here, for they involved statutes which were completely devoid of a definition of "wages." The decisions under the New York Unemployment Insurance Law seem equally inapplicable, since they involved a statutory definition of wages different from that contained in the Social Security Act; and, in any event, the cases are of doubtful persuasiveness since they are only memorandum opinions, without disclosure of the basis for the position taken."

4. THE PURPOSES OF THE SOCIAL SECURITY AND THE NATIONAL LABOR RELATIONS ACTS.

Although the interpretation of the Social Security Act as excluding "back pay" is supported by the statutory language and by the consistent administrative practice of the Bureau of Internal Revenue and the Social Security Board, we do not wish to imply that such a construction will tend to further the objectives of the Social Security Act or the National Labor Relations Act. In its minutes of March 27, 1942 (Appendix D, *infra*, p. 37), the Social Security Board agreed "as to the desirability of amending the statute to pro-

[11] The New York Unemployment Compensation Law defines "wages" as "remuneration" paid "with respect to employment;" and the word "employment" is defined as "any employment under any contract of hire," "express or implied, written or oral." Sec. 502 of New York Labor Law, Thompson's Consol. Laws N. Y., Chap. 31, Art. 18.

vide for inclusion as 'wages' of payments of back pay."

It is, of course, a matter of common knowledge that the Social Security Act, insofar as its old age insurance benefits are concerned, has a "great humanitarian purpose" (R. 43) and was intended to relieve or mitigate the want which experience had shown was the common lot of the majority of workers who reached the age of sixty-five. H. Rep. No. 728, 76th Cong., 1st Sess., pp. 3–4; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 3–4. "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis*, 301 U. S. 619, 641.

We believe that this policy would be advanced if workers are not deprived of some of their old-age protection because they are the victims of unlawful employer practices; if in fact the employer is required to make them whole financially there is no persuasive reason of policy why the amount paid them should not be treated as wages for Social Security purposes.

Consideration of the purposes of the National Labor Relations Act leads to the same conclusion. For, under the Labor Act, the "back pay" order in one aspect has been conceived to be a device for "making whole" unlawfully discharged employees. Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7; *Third Annual Report of the National*

Labor Relations Board, p. 200. This objection would be partially frustrated if "back pay" were not classified as "wages" under the Social Security Act, since the employee would be denied certain Social Security benefits he would have enjoyed but for his unlawful discharge. The court below observed (R. 60), this would mean that "rights, the exercise of which it is national policy to encourage, may be exercised only at the peril of surrendering rights under other social legislation created for the protection of the same persons."

We think it appropriate for the Court to give consideration to the objectives of both the Social Security and the Labor Relations acts. But in the absence of some showing of congressional intention on the point here in question [18] we are forced to the conclusion that the over-all or general purposes of the two statutes do not manifest legislative intention on this issue clearly enough to warrant rejection of the ordinary meaning of the specific language of the statutory definition. The language of a law is itself the strongest indication of purpose

[18] We have not been able to find in the legislative history of the Social Security Act any specific reference to "back pay." The Labor Relations Act itself, which gave rise to "back pay," was enacted on July 5, 1935, less than two months prior to the adoption of the Social Security Act. Congress probably did not consider the specific problem nor even have any awareness of its existence. The Social Security Act was experimental in a number of its features and it was intended that it would be changed from time to time to take care of any deficiencies which experience might disclose therein. H. Rep. No. 728, pp. 4–5; S. Rep. No. 734, p. 4, both *supra*.

on a particular point. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 543. Although a different result might be more in harmony with the statutory objectives, the literal interpretation of the Act does not produce an absurd result. While we do not believe the administrative difficulty in classifying "back pay" as "wages" to be insuperable, it is not inconceivable that Congress might have thought this a reasonable basis for not making an exception to the general definition.

We accordingly conclude that the Social Security Board did not err in giving the statutory definition a literal construction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
JOSEPH B. GOLDMAN,
Attorneys.

DECEMBER 1945.

APPENDIX A

STATUTES INVOLVED

1. Title II of the Social Security Act (49 Stat. 622, as amended, 53 Stat. 1360, 42 U. S. C. Sec. 401 *et seq.*) provides in part as follows:

> SEC. 203. *Reduction and increase of insurance benefits.* * * *
>
> (d) Deductions, in such amounts and at such time or times as the Board shall determine, shall be made from any payment or payments under this title to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits for any month in which such individual:
>
> (1) rendered services for wages of not less than $15; or
>
> * * * * * *
>
> SEC. 209. *Definitions.*
>
> When used in this title—
>
> (a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *
>
> (b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed

after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed or in connection with a vessel not an American vessel by an employee, if the employee is employed on and in connection with such vessel when outside the United States;

(6) Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1410 of the Internal Revenue Code by virtue of any other provision of law;

(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under

the Constitution of the United States from the tax imposed by section 1410 of the Internal Revenue Code;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; * * *.

* * * * *

(e) The term "primary insurance benefit" means an amount equal to the sum of the following—

(1) (A) 40 per centum of the amount of an individual's average monthly wage if such average monthly wage does not exceed $50, or (B) if such average monthly wage exceeds $50, 40 per centum of $50, plus 10 per centum of the amount by which such average monthly wage exceeds $50 and does not exceed $250, and

(2) an amount equal to 1 per centum of the amount computed under paragraph (1) multiplied by the number of years in which $200 or more of wages were paid to such individual. Where the primary insurance benefit thus computed is less than $10, such benefit shall be $10.

* * * * *

(g) The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (h) of this section, the term "quarter" and the term "calendar quarter" mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term "quarter of coverage" means a calendar quarter in which the individual has been paid not less than $50 in wages. * * *

* * * * *

2. The National Labor Relations Act (49 Stat. 449; 29 U. S. C. Sec. 151 *et seq.*) provides in part as follows:

SEC. 2. *Definitions.*

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the do-

mestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 10 (c). * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

APPENDIX B

INTERNAL REVENUE INTERPRETATION

S. S. T. 359, 1939-1 Cum. Bull. 305 of the Bureau of Internal Revenue, reads in part as follows:

> Advice is requested whether payments made to employees of the M Company, who had been discharged and who were reinstated pursuant to an order issued by the National Labor Relations Board, constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.
>
> * * * * * *
>
> As indicated above, for purposes of the National Labor Relations Act, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment". However, it does not follow that the sum of money paid to that individual upon reinstatement pursuant to an order of the Board constitutes *remuneration for services performed by an employee for his employer* for the purpose of the taxing provisions of the Social Security Act. Such employee has actually performed no services for which such payments are made, and the employer has done all within his power to terminate the employment relation, at least temporarily.

Furthermore, the individual has no right to demand any compensation from the employer for that period, and it is within the discretion of the Board to decide whether reinstatement shall be with or without back pay, depending on the circumstances in the particular case.

* * * * *

It is held that the payments in question made to employees of the M Company do not constitute *remuneration for services performed by an employee for his employer,* but are payments to the employees on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services to the M Company. Accordingly, such payments do not constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

APPENDIX C

LETTER FROM SOCIAL SECURITY BOARD

FEDERAL SECURITY AGENCY,
WASHINGTON, *August 8, 1945.*

SOLICITOR GENERAL OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

Re: *Joseph Nierotko* v. *Social Security Board* (United States Circuit Court of Appeals, Sixth Circuit, Civil No. 9896).

DEAR SIR: Reference is made to the opinion of the Circuit Court of Appeals in the above-entitled case in which it has been held that back pay awarded to an employee by the National Labor Relations Board constitutes "wages" within the meaning of the Social Security Act. We have been informed that in preparing your brief for application for writ of certiorari with the Supreme Court of the United States, you have been disturbed by the statement in the opinion, "That such difficulties are not insuperable [administrative difficulties in treating back pay as current wages during the period of unlawful discharge] is demonstrated by its [the Board's] practice in crediting to the employee the differential between wages paid and the legal minimum under the Fair Labor Standards Act when payment is made in pursuance of an administrative order or a court

decree." You have inquired to ascertain how, in fact, the Social Security Board does credit such payments to the wage record of an employee.

We wish to point out, first, that payments ordered by the Wage and Hour Division of the Department of Labor represent the difference between wages paid by an employer for services rendered and the legal minimum wage payable under the Fair Labor Standards Act for services rendered. In considering such payments as "wages" the Social Security Board has always recognized that they are granted as remuneration for service and hence fall within the definition of "wages" in section 209 (a) of the Social Security Act, as amended.

Although such payments are "wages," the Social Security Board has not credited them to the wage records of the employees in the manner suggested by the court in its opinion. They are not credited to the periods for which they are paid or in which the services were performed. Under the provision of section 209 (g) of the Social Security Act, as amended, a quarter of coverage is a calendar quarter during which "wages" of not less than $50 are paid. Under the present terms of the Act, these payments are considered to be wages paid at the time when the employer actually pays over the money pursuant to administrative order or court decree.

We deem it advisable, however, to call to your attention that for purposes of deductions from benefit payments to beneficiaries, wage payments ordered pursuant to the provisions of the Fair Labor Standards Act will cause deduction for the

month in which the beneficiary rendered services when the bonus payment, together with amounts received for such services in that month, are equal to wages of more than $14.99. If the amount paid in any such month, together with the back wages allocable thereto, is in excess of $14.99, deductions under either section 203 (d) or section 203 (e) of the Social Security Act, as amended, are required. Allocation in this instance is necessitated by the language of the Act which reads: "* * * for any month in which such individual: (1) rendered services for wages of not less than $15; * * *."

We trust that this information will be of assistance to you.

Sincerely yours,

JACK B. TATE,
General Counsel.

APPENDIX D

SOCIAL SECURITY BOARD MINUTES

NOVEMBER 26, 1945.

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code, I hereby certify that the following is a true copy of the minutes of proceedings at a meeting of the Social Security Board on March 27, 1942, regarding Payments of Back Pay Made Under the National and State Labor Relations Acts, Federal and State Wage Laws, and Union Agreements in Relation to Unemployment Compensation:

> Pursuant to Board action of January 16, 1942, page 11441, paragraph 6, the Board again considered the questions presented in the memoranda from Mr. Pogge dated December 26, 1941, "Payments of Back Pay Made Under the National Labor Relations Act" and from Mr. Corson dated January 12, 1942, "Payments of Back Pay Made Under the National and State Labor Relations Acts, Federal and State Wage Laws, and Union Agreements in Relation to Unemployment Compensation" (Document No. 5663–e). The Board determined that such payments of back pay cannot be considered as constituting "wages" within the meaning of Section 1607 (b) of the Unemployment Tax Act, and Sections 209 (a) and 209 (h)

of the Social Security Act as now written. Mr. Altmeyer dissented on the grounds that law and equity require that such payments be considered as constituting wages.

The Board agreed as to the desirability of amending the statute to provide for inclusion as "wages" of payments of back pay with respect to the above-mentioned Sections, and also to provide, for purposes of Section 209 (g), retroactive credit for quarters of coverage during the period covered by the back pay allowance. The Bureaus of Employment Security and Old-Age and Survivors Insurance and the Office of the General Counsel were instructed to develop proposed amendatory language for the Board to consider in connection with over-all substantive amendments to the Social Security Act.

The original record of said minutes is now on file in the Federal Security Agency.

In witness whereof, I have hereunto set my hand and caused the seal of the Federal Security Agency to be affixed on the day and year first above written.

By direction of the Federal Security Administrator.

[SEAL]

[S] M. COLLINS,
Assistant Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1949

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 10 1945
CHARLES ELMORE CROPLEY
CLERK

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD,
Appellant,
vs.
JOSEPH NIEROTKO,
Appellee

BRIEF FOR JOSEPH NIEROTKO

ERNEST GOODMAN,
MORTON A. EDEN,
3220 Barlum Tower,
Detroit 26, Michigan,
Attorneys for Appellee.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2-3
Applicable provision of the National Labor Relations Act (49 Stat. 453, July 5, 1935)	2-3
Applicable provisions of the Social Security Act (49 Statute 624, August 14, 1935)	3
Statement	4-5
Summary of Argument	5-6
Argument	7-29
A. Terminology	8
B. Substance	9-23
1. Back pay awards are computed exactly as wages	9-10
2. The employment relationship continues as a matter of law and the recipients of back pay are employees	10-12
3. Decisions of State Courts hold that back pay constitutes wages	12
4. Back pay is considered as "wages or compensation for personal services" under the Internal Revenue Act	13
5. "Back pay" has been held provable as "wages earned" under the Bankruptcy Act	13-15
6. A reinstated employee under the National Labor Relations Act is entitled to all of the benefits and incidents of employment as though he had been actually working	15

Page

7. The legal doctrine of "constructive services" applies to employes reinstated under the National Labor Relations Act... 16-17

8. The fact that the employer presumably derives no direct benefit from the payment of "back pay" does not change its character as wages..... 17-18

9. Back pay does not change its character as wages merely because a discharged employee does not perform actual work for the employer..... 19-21

10. Whether back pay should be credited to the quarter in which it was paid or over the period of appellee's discharge is not an issue in this case..... 22

11. The administrative construction of the Act is entitled to little weight..... 22-23

C. Policy 24-29

INDEX TO AUTHORITIES CITED

Agwilines v. National Labor Relations Board C. C. A. 5th, 1936), 87 F. (2d) 146..... 9

Carmean v. North American Transp. Co., 45 Wash. 446, 8 LRA (NS) 595..... 16

Ford Motor Co. v. National Labor Relations Board, 312 U. S. 689..... 5

Gutzwiller v. American Tobacco Co., 122 Atl. 586 (Vt., 1923) 21

In re Tonra, 250 App. Div. 835, 15 N. Y. S. (2d) 755 (1939) 12

Labor Board v. Waterman SS. Co., 309 U. S. 206, 218 11

Manseau v. United States, 52 Fed. Supp. 395 (1943) 13

McCoy v. Remington Rand, Inc., 262 App. Div. 790, 27 N. Y. S. (2d) 298..... 12

	Page
Michigan Law Review, Vol. 41, Page 66	19
National Labor Relations Board v. Ford Motor Co., 114 F. (2d) 905	5
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1	15
National Labor Relations Board v. Killoren, Trustee (C. C. A. 8th, 1941), 122 F. (2d) 609	9, 13, 26
Phelps-Dodge Corp. v. N. L. R. B., 313 U. S. 177	24
Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7 (61 Sup. Ct. 77) (1940)	9, 10
Republic Steel Corp. v. N. L. R. B., 311 U. S. 7	15
Republic Steel Corp. v. N. L. R. B., 114 F. (2d) 820	15
Skidmore v. Swift & Co., 323 U. S. 134	22
Third Annual Report of National Labor Relations Board, pages 200, 201, 202	11, 15

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD,
Appellant,
vs.
JOSEPH NIEROTKO,
Appellee

BRIEF FOR JOSEPH NIEROTKO

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 53) is reported in 149 F. 2d 273. The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion.

JURISDICTION

Appellee accepts the statement of the Social Security Board as to jurisdiction.

QUESTION PRESENTED

Appellee accepts the statement of the Social Security Board, namely:

> "Whether 'back pay' awarded pursuant to Section 10(c) of the National Labor Relations Act constitutes 'wages' under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account."

STATUTES INVOLVED

Applicable Provisions of the National Labor Relations Act [49 Stat. 453 (July 5, 1935)]

Section 2(d) of the Act defines an employee to include

> "Any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

Section 10(c) of the Act provides that

> "If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-

son to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Applicable Provisions of the Social Security Act[1]
[49 Statute 624 (August 14, 1935)]

The provisions of the Social Security Act[1] deal with the taxes for federal old age insurance benefits and for federal unemployment compensation. Both are substantially identical.

Section 209(a) of the Social Security Act defines "wages" as "all remuneration for employment."

Section 209(b) defines "employment" as "any service, of whatever nature, performed—by an employee for the person employing him."

Section 205(c) (1) of the Social Security Act provides:

> "On the basis of information obtained by or submitted to the Board and after such verification thereof as it deems necessary, the Board shall establish and maintain records of the amounts of wages paid to each individual."

---

[1]The benefit features of the old-age and survivor's insurance system are set forth in Title II of the Social Security Act, 42 U. S. C. (1940), Sec. 402; the taxing features of this program are set forth in the Federal Insurance Contributions Act, Subchapter A of the Chapter 9 of the Internal Revenue Code, as amended, 26 U. S. C. (1940) Sec. 1400 *et seq.*

STATEMENT

Appellee accepts the statement[2] of the Social Security Board with the following additional statement: The instant suit is a test case to determine whether back pay awarded to thousands of illegally-discharged employees under the provisions of the National Labor Relations Act shall be considered as wages for the purpose of computing benefits under the Social Security Act. The suit has been so regarded by all parties to the litigation since its inception.

On August 9, 1939, the National Labor Relations Board issued a decision and order commanding the Ford Motor Company to reinstate several employees (including the appellee) who had been discharged for union activities and to pay each employee a sum of money equal to that he would have earned as wages during the period from date of discharge to date of offer of reinstatement, less his net earnings during such period in other employment, including work relief projects. On December 5, 1940, the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment commanding enforcement of the board's order, with certain modifications not material

---

[2]Comment on petitioner's footnote No. 1.—The facts concerning the withholding of the Social Security tax by the Ford Motor Company correctly appear on Page 29 of the Record as follows:

> "The one per cent social security tax was not deducted from the total amount awarded to Mr. Nierotko by the National Labor Relations Board. That was true of all 23 cases included in the National Labor Relations Board's ruling of August 9, 1939, but in each of the 3,000 subsequent cases, the Ford Motor Company withheld the one per cent social security tax (pending a final determination as to whether amounts paid under such rulings constitute wages), pursuant to an agreement with the union. There was no such agreement in this case."

here (*National Labor Relations Board v. Ford Motor Company*, 114 F. (2d) 905) and on February 10, 1941, the Supreme Court of the United States denied the company's petition for a writ of certiorari (*Ford Motor Company v. National Labor Relations Board*, 312 U. S. 689) (R. 12).

The sum of $3,501.32 was paid to appellee as "back pay" by the Ford Motor Company, representing the amount he would have earned had he been permitted to work at his customary duties at the Ford Motor Company which he always remained willing and able to perform, but which the Ford Motor Company refused to permit him to perform in violation of the National Labor Relations Act (R. 12, 13).

SUMMARY OF ARGUMENT

"Wages" are defined in Sec. 290(a) of the Social Security Act as "all remuneration for employment." Section 209(b) defines "employment" as "any service of whatever nature performed by an employee for the person employing him." This definition is not a narrow or technical definition. The use of the words "any" and "of whatever nature" to describe "service" indicates that Congress intended as broad a construction as possible. Since "pay" and "wages," by dictionary definition and by common usage, are synonymous, "back pay" received under the provisions of the National Labor Relations Act by an "employee," as a matter of terminology, is "wages" under the Social Security Act.

As a matter of substance, back pay has the same incidents and characteristics as "wages." Back pay awards are computed exactly as wages. They are paid as the result of an employment relationship continued in legal

effect by statute. The recipients of back pay are employees. Back pay is considered "wages or compensation for personal services" under the Internal Revenue Act. It has been held provable as "wages earned" under the Bankrupty Act. Under the provisions of the National Labor Relations Act an employee who is re-instated is entitled to all of the benefits and incidents of employment as though he had been actually working.

Actual work, mental or physical, is not an essential requirement for payments to be considered "wages." If payments are made pursuant to an employment relationship, whether existing by contract or statute, and the recipient has held himself available for work, then such payments are wages even though his employer received no direct benefit and even though no mental or physical labor is performed.

The broad purposes and objectives of both the Social Security Act and the National Labor Relations Act are concededly effectuated by the construction of the Court below which held "back pay" under the National Labor Relations Act to be "wages" under the Social Security Act.

ARGUMENT

The National Labor Relations Act provides in Section 10 (c) that the National Labor Relations Board may in certain instances order "re-instatement of employees with back pay." Section 2(d) of the same Act defines an employee to include an "individual whose work has ceased because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." Benefits under the Social Security Act are based on "wages" which are defined in Section 209(a) as "all remuneration for employment." "Employment" in turn is defined in Section 209(b) as "any service of whatever nature." The Circuit Court of Appeals for the Sixth Circuit held that "back pay" received under the provisions of the National Labor Relations Act is "wages" or "remuneration for employment," within the meaning of the Social Security Act.

Appellant concedes that this construction is in conformity with, and will further the objectives and purposes of Congress as expressed in both the Social Security Act and the National Labor Relations Act.

Appellant's position is that the objectives and purposes of Congress cannot be effectuated because "of the letter of the Statute" (the Social Security Act).

An analysis of the provisions of the two acts with reference to their terminology and substance as well as their purpose and objectives shows, we believe, that back pay awards under the National Labor Relations Act constitute wages under the Social Security Act.

A. TERMINOLOGY

The pertinent language of the National Labor Relations Act and the Social Security Act shows that "back pay" awards under one act do constitute "wages" under the other act.

The terms "pay" and "wages" are synonymous. Thus Webster's International Dictionary defines "pay" as "that which is paid; remuneration; wages; salary." It defines "wage" as "that which is pledged or paid for work or other services; hire; pay." It defines "wages" as "pay" given for labor * * * syn. wages, hire, salary, pay, emolument * * * pay may be equivalent esp. to wages."

The definition of "wages" in the Social Security Act as "remuneration for *any* service of *whatever nature*" (italics supplied) is not a narrow or technical definition. It is even broader than the dictionary definition which is, "that which is pledged or paid for work or other services" or "pay given for labor." The use of the words "any" and "of whatever nature" to describe "service" indicates that Congress intended as broad a construction as possible. It is difficult to see how Congress could have used broader language.

"Pay" (used in the National Labor Relations Act) is ordinarily understood and is defined in the dictionary as synonymous with "wages."

Furthermore wages under the Social Security Act is defined as remuneration for "employment" and under the provisions of the National Labor Relations Act appellee was an "employee."

We submit that under the "letter of the statute," the Circuit Court of Appeals was correct in holding that "back pay" awarded to an "employee" under the National Labor Relations Act is "wages" under the Social Security Act.

B. SUBSTANCE

"Back pay" is awarded under the provisions of a statute, the National Labor Relations Act. Its incidents and characteristics are created by that statute. We will show that these incidents and characteristics are similar to those of ordinary "wages" or pay.[3]

1. Back pay awards are computed exactly as wages.

Back pay awards are computed exactly as wages are computed. A typical back pay order provides that the employer shall reimburse the employees "by payment to each of them, respectively, of a sum of money equal to that which each of them, respectively would normally have earned as wages during the period from the date of their discharge to the date of such offer of reinstatement, less any money earned by each of them, respectively, during that period." (See Third Annual Report, National Labor Relations Board, p. 201, n. 99.)

Deductions made in computing the amount of back pay due from the employer to the discriminated employee are made only with respect to wages earned by the employee from other employers during the period in which he had been discriminately discharged. Deductions may not be made, however, of income other than wages from such sources as welfare; unemployment compensation, insurance, etc.

The fact that back pay awards under the National Labor Relations Act are computed solely as wages is made clear

---

[3]It has been judicially determined that back pay is not damages nor is it a penalty. *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7 (61 Sup. Ct. 77), *Agwilines v. N.L.R.B.* (C.C.A. 5th, 1936), 87 F. (2d) 146, *National Labor Relations Board v. Killoren, Trustee*, (C.C.A. 8th, 1941), 122 F. (2d) 609.

by decisions where the courts have refused to allow the board to require the employer to pay any sum which did not properly constitute wages. In the case of *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7 (61 Sup. Ct. 77) (1940) the Court refused to uphold a board order which required the employer to repay to the Government wages on work relief projects which the Government had paid to the employees during their period of discriminatory discharge, even though the employer had indirectly received the benefit of these wages in that they were deducted from the amount of the back pay awards.

2. The employment relationship continues as a matter of law and the recipients of back pay are employees.

Section 2(d) of the National Labor Relations Board specifically defines an employee to include "Any individual whose work has ceased * * * because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment."

In its decision in the *Republic Steel* case *(supra)* the court had occasion to discuss the nature of back pay, which it referred to as "compensation of employees." On this aspect of the case the court, in concluding that an award of back pay was not in the nature of a penalty or fine as would allow the board to compel the employer to pay anything more than loss of wages, stated:

> "The act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. *The act does not prescribe penalties or fines* in vindication of public rights or provide indemnity against community losses as distinguished from the protection and *compensation of employees.*" (Italics supplied.)

In *Labor Board v. Waterman SS. Co.*, 309 U. S. 206, 218, it was said, "In the words of the Act an employer cannot terminate his employee's tenure of employment or any term or condition of employment because of union activity or affiliation. * * * They embrace, as well all elements of the employment relationship which in fact customarily attended employment. * * *"

So also, an employee who is discriminatorily discharged must maintain his position as an employee. He must hold himself available for work when called by his employer or lose any further right to back pay. (See Third Annual Report of National Labor Relations Board, pages 201, 202.)

The argument has also been advanced that although the National Labor Relations Act defines an employee to include an "individual whose work has ceased because of any unfair labor practice," such a person is not an "employee" within the meaning of the Social Security Act.

It will be noted that the Social Security Act does not define the term "employee." Under the common law an employer had the right to discharge an employee for union activities and the employment relationship thereupon terminated. Congress, however, in the National Labor Relations Act, has modified the common law rule by making it illegal for an employer to terminate the employment relationship by discharging an employee in pursuance of an unfair labor practice. Congress has provided that the person so discharged remains an "employee" despite the action of the employer.

The argument that such person is nevertheless not an employee under the Social Security Act apparently proceeds on the theory that the Social Security Act refers to employees only as they were so considered in law prior to the enactment of the National Labor Relations Act.

Such a construction is not warranted by the language of the Social Security Act or by its broad purposes.

It must be presumed that by using the term "employee," without definition, in the Social Security Act which it adopted on August 14, 1935, Congress had fully in mind its definition of the term "employee" in the National Labor Relations Act which it had adopted only a month before, on July 5, 1935.

3. Decisions of State Courts hold that back pay constitutes wages.

The Unemployment Compensation Commissions in the various states have had occasion to determine whether back pay under the National Labor Relations Act constituted wages under their respective Unemployment Compensation Acts. The decisions of the various commissions are divided on this issue. However, two such decisions by the New York Unemployment Compensation Board, holding that back pay under the National Labor Relations Act constitutes wages under the New York Unemployment Insurance Act, were affirmed on appeal to the courts.

In re Tonra, 258 App. Div. 835, 15 N. Y. S. (2d) 755 (1939),

McCoy v. Remington Rand, Inc., 262 App. Div. 790, 27 N. Y. S. (2d) 298.

4. Back pay is considered as "wages or compensation for personal services" under the Internal Revenue Act.

Recently the District Court for the Eastern District of Michigan had occasion to determine that back pay under the National Labor Relations Act constitutes "wages or compensation for personal services." *Manseau v. United States*, 52 Fed. Supp. 395 (1943). In this case an employee of the Ford Motor Company, who was awarded back pay at the same time as the plaintiff herein, sought to establish that the back pay so received did not constitute income within the meaning of the income tax laws. The court discussed the nature of a back pay award under the National Labor Relations Act and made the following pertinent observation:

> "The money received by plaintiff which has been referred to in the findings of fact as *back pay is income derived from wages or compensation for personal services* within the meaning of Section 22 (a) of the Internal Revenue Act, 26 U. S. C. A. Int. Rev. Code Sec. 22 (a)." (Italics supplied.)

5. "Back pay" has been held provable as "wages earned" under the Bankruptcy Act.

A recent case in which the court has had occasion to pass upon the nature and character of back pay under the National Labor Relations Act is that of *National Labor Relations Board v. Killoren, Trustee* (C. C. A. 8th, 1941) 122 F. (2d) 609. In that case the court was asked to determine that a back pay award under the National Labor Relations Act was provable as a wage claim under the Bankruptcy Act. In a well-reasoned opinion the court discussed the leading decisions on the nature of back pay awards and reached the conclusion that back pay constituted "wages earned" within the meaning of the Bank-

ruptcy Act. Significantly, the court, in examining the status of a discriminatorily discharged employee during his period of discharge, found that he had a "continued status under the act as an employee," and that as a consequence he had "constructively earned" his back pay. The following pertinent discussion deals directly with the issue involved in the present case:

> "The purpose of a back pay allowance under the National Labor Relations Act, when awarded by the board to effectuate the policies of the act, is, as has been indicated above, to leave an employee, as nearly as possible, in the same situation that he would have occupied, if there had been no discrimination against him. *As to the employee at least, it is, in a practical and sound legal sense, nothing more or less than wages.* It is compensation to which he is entitled, by reason of his continued status under the act as an employee, and which the act and the order of the board regard him as having *constructively earned.* The language of the act specifically denominates it 'back pay.' It ought not, therefore, equitably or in the spirit of the act, to be given either a superior or a subordinate legal position to the wages of other regular employees, if there is any sound way to avoid doing so."

> "We have declared above that a back pay allowance, under the provisions of the National Labor Relations Act, is intended as, and *constitutes, wages which a workman has constructively earned by reason of his continued status as an employee.* This view clearly brings it within the operation of Par. 64a (2), 11 U. S. C. A. par. 104a (2), governing wage priorities. If the act had authorized such an allowance to be made in the nature of damages, a different situation would perhaps be presented. Congress has, however, specifically made it 'back pay' in a *continued employment status,* and this sufficiently constitutes it 'wages earned' to eliminate legal shawods." (Italics supplied.)

We submit that if back pay under the National Labor Relations Act is "wages *earned*" under the Bankruptcy Act, it should be considered as "wages" under the Social Security Act.

6. A reinstated employee under the National Labor Relations Act is entitled to all of the benefits and incidents of employment as though he had been actually working.

The employee discharged as a result of an unfair labor practice who is ordered reinstated is entitled, in addition to back pay, to all the other benefits of employment which he would have obtained had he actually been working for the employer. Thus such an employee, upon reinstatement, is entitled to all his insurance rights, his vacation rights, his seniority status and any other rights that may have accrued to him had he not been illegally discharged.

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1.

Republic Steel Corp. v. N. L. R. B., 311 U. S. 7.

Republic Steel Corp. v. N. L. R. B., 114 F. (2d) 820.

Third Annual Report of National Labor Relations Board, page 200.

The Circuit Court of Appeals for the Sixth Circuit pertinently observed (R. 45)

> "We are asked to hold that of the rights of unlawfully discharged employee protected by the Labor Act, all may be preserved by administrative order, except the single right which in the exigencies of a post-war period may be the most important. * * *"

7. The legal doctrine of "constructive services" applies to employees reinstated under the National Labor Relations Act.

Although the doctrine of "constructive earnings" or "constructive services" need not be adopted to justify the conclusion that back pay constitutes wages, the application of this doctrine to the status of a discriminatorily discharged employee would be in accord with recognized legal principles.

Under the English common law the doctrine that an employee who had been illegally discharged had constructively performed services for his employer was generally recognized. While more recent English decisions have apparently repudiated this doctrine, it is recognized as sound law in many states by decision or by statute. It is significant, however, that those jurisdictions in this country which have rejected the doctrine have done so in the belief that if the court permitted an illegally discharged employee to be considered as having been constructively employed, such doctrine would be "not only at war with principle, but with the rules of political economy, as it encourages idleness * * *. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor. * * *" *Carmean v. North American Transp. Co.*, 45 Wash. 446, 8 LRA (NS) 595.

(For a full discussion of the doctrine of Constructive Service as developed in English and American jurisprudence see 35 Am. Jur. page 484; 8 ALR 342; 17 ALR 630.)

The "encouragement of idleness" theory in its application toward the employment relationship is itself repudiated by the National Labor Relations Act which by definition gives continuing status to an employee who has been discharged as a result of an unfair labor practice and makes it possible for him to obtain the full benefits of such status, including back pay.

If the legal concept of "constructive service" were applied to the status of a discriminatorily discharged employee under the National Labor Relations Act, it would clearly follow as a legal conclusion that back pay received by him would be reimbursement for services rendered and would therefore be taxable under the Social Security Act.

8. The fact that the employer presumably derives no direct benefit from the payment of "back pay" does not change its character as wages.

The fact that in the ordinary case of wage payments the employer presumably receives a direct benefit, while in cases where back pay is awarded he presumably receives no benefit, is of no significance.

Whether or not the employer received any actual benefit from the employee cannot be determinative of whether payments constitute wages. Payments made by employers to employees who are absent from work while serving in the State National Guard[4] and to employees absent from work while on jury service[5] are held by the Social Security Board to be "wages" within the meaning of the Social Security Act.[6]

---

[4]SST 49 CB XV-2, 420 (1936).

[5]SST 389 CB 1940-1, 212.

[6]If benefit to the employer were a requirement it could well be argued that the Ford Motor Company in the instant case did derive benefits from the discharge of over 3,000 of its employees (including Appellee) for union activities and in violation of the provisions of the National Labor Relations Act. It is quite probable that these discharges delayed the organization of its employees thereby delaying wage increases and better working conditions resulting when organization became effective. It is quite probable that the saving thus resulted to the employer exceeded the amount paid as "back pay."

Section 490(a) of the Social Security Act provides:

> "The term 'wages' means all remuneration for employment * * * except that such terms shall not include * * * (5) dismissal payments which the employer is not legally required to make."

This exclusion of "dismissal payments," except those which the employer is legally required to make, became effective by amendment on January 1, 1940. Since then only those "dismissal payments" received by employees under individual contracts or union agreements or which are otherwise required by law are considered as "remuneration for employment." There would seem to be no distinction in principle between "dismissal payments" which the employer is legally required to make, and "back pay" which the employer pays only because he is required by statute so to do. Neither dismissal payments, to an employee or payments made to an employee while on jury service or on service with the National Guard are paid for direct benefits to the employer. Since such payments are held to be wages under the provisions of the Social Security Act it is evident that the fact that an employer derives no direct benefit from "back pay" awards to an employee under the National Labor Relations Act does not change its character as "wages."

9. Back pay does not change its character as wages merely because a discharged employee does not perform actual work for the employer.

Although an employee who is discriminatorily discharged is not actually working, he must hold himself available for work when called by his employer. If his employer offers to reinstate him, he must accept the offer. If he refuses, he loses his right to any further back pay or any other benefits arising from the employment relationship. (See Third Annual Report of National Labor Relations Board, pages 201, 202.)

The Circuit Court of Appeals correctly observed that "if services performed in the asserted meaning of that phrase is a statutory element in the concept of wages, must there not then be an inquiry in every case as to whether the wages were earned by service? Admitting a contract of employment, an obligation to pay, and the liquidation of the obligation by payment, are the benefits of the Act not to be denied under the reasoning of the Board when no labor is performed? Tested, by *reductio ad absurdum*, its construction may not stand" (R. 45).

The requirement of actual physical or mental labor or work is discussed by Mr. Michael Egoner in Vol. 41 Michigan Law Review, page 66 (August 19, 1942). During the course of his discussion, from which he concludes that back pay under the National Labor Relations Act constitutes wages under the Social Security Act, the author states:

> "That actual physical or mental labor is immaterial for a finding that 'services' were performed, seems to be a well established principle. In *Re B. H. Gladding Co.*[29] the federal district court was asked

[29] (D.C.R.I. 1903) 120 F. 709.

to determine whether an employee had a valid priority claim for wages with respect to a vacation with pay under a plan established by the employer. The employee took the full vacation, but before he could obtain the pay, the employer went into bankruptcy and the referee in bankruptcy disallowed the claim, on the ground that the bankruptcy statute provided priority for wages earned and in this case the alleged wages had not been earned. The court contradicted the referee's determination and stated in part:

> "* * * To attempt distinctions between wages due which are earned and wages due which are not earned, by an inquiry into the amount of work done by the wage earner, would be entirely impractical. If we disallow claims for a week's vacation, we must also disallow claims for half days when stores are closed, and for days and hours when there is nothing to do. Wages 'are earned,' in the sense in which that term is used in the bankruptcy act, so long as a *bona fide* contract of hiring exists, and the clerk or servant continues in the master's employment and does all that he is required to do. The practice of giving vacations with continued pay is very general in all departments of business. Vacation wages cannot be regarded as a mere gratuity, given in recognition of past or present services. By continuing the relation of employer and employee during a dull season, the employer holds his working force in readiness for the active season. The relation of the employer and employed is as strictly a business relation as it is during the working season, and there is full legal consideration for the master's promise to pay wages during this period."[49]

---

[49]Id. 711.

"The social security statute itself clearly departs from any principle that a showing of services in the form of actual physical or mental labor must be made. The following types of payments have been deemed to be 'wages' although they arise in situations in which actual labor has obviously not been performed:[41]

"(a) Vacation pay;

"(b) Sick pay, disability pay, medical and hospital expenses, when such payments are not a part of an established plan;

"(c) Pay while on state National Guard duty;[42]

"(d) Retainer fees to consultants, etc."

---

[41]Cf. Social Security Board, Regulations No. 3, Secs. 403.827.

[42]Social Security Board, Unemployment Compensation Interpretation Service, Federal Series, 1937, 47 SST 49.

See also, on the point that actual physical or mental labor is immaterial for a finding that "services" were performed, *Gutzwiller v. American Tobacco Co.* (122 Atl. 586, Vt., 1923).

The foregoing discussion, we believe, amply supports the proposition that it is not essential that an employee be actually at work in order to earn wages within the meaning of the Social Security Act.

10. Whether back pay should be credited to the quarter in which it was paid or over the period of appellee's discharge is not an issue in this case.

Appellant discusses at some length whether back pay, if it is wages, should be credited to the quarter of the year in which it was paid or over the period of discharge. That issue is not involved in this case. In its answer filed in the District Court, the Social Security Board says:

> "The defendant admits that the sole question in dispute is whether the amount received by the plaintiff pursuant to the National Labor Relations Board consttiutes wages within the meaning of the Social Security Act" (R. 4). See also agreed statement of "question presented" in this Court *(supra)*.

11. The Administrative Construction of the Act is entitled to little weight.

Appellant contends that the court should uphold its administrative construction. This court recently ruled in *Skidmore v. Swift & Co.* (323 U. S. 134) that the weight to be given to the interpretation of the administrative agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade if lacking power to control." Courts are properly reluctant to reverse an administrative ruling designed to effectuate the policy of a statute. In the instant case not only is the ruling *not* designed to effectuate the Congressional policy, but the administrative agency concedes that its construction is *contrary* to the objectives and purposes of the Social Security Act and the National Labor Relations Act. It relies for its construction on "the letter of the statute." We believe that the construction of "the letter of the Statute" is a matter peculiarly within the province of the Courts.

An administrative interpretation of the "letter of the Statute" not required to effectuate the policy of the statute, but admittedly contrary to its policy, is entitled to little weight.

The fact that the ruling of the Social Security Board has been in effect for some years lends no support to the Appellant's position in this case. There has been no prejudice to the Board by any delay. Furthermore, correspondence between counsel for appellee and the Board began on September 20, 1941, more than four years ago. Extended correspondence took place and several consultations were thereafter held in an effort to persuade the Board to change its determination. Administrative proceedings were commenced some time prior to November 3, 1942 (R. 30) and appellee has diligently pursued his remedy through the administrative procedure required and in the Courts to the present time.

C. POLICY[7]

We are here concerned with the relationship between two Federal statutes dealing in general with the same subject matter, the employment relationship. It can be set down as a fundamental principle that the two statutes should be consistently construed to effectuate the policies of both. From this point of view it becomes clear that back pay awards must be deemed wages within the meaning of the Society Security Act.

The purpose of back pay awards under the National Labor Relations Act is to make an employee whole. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U. S. 177. The power of the board in granting back pay is intended to restore an employee to all his rights and privileges. As we have already pointed out, such employees have been restored to full seniority status, and to full insurance and vacation benefits.

---

[7](a) Under collective bargaining agreements it is a common practice to arbitrate the discharge or lay-off of employees, where it is claimed that such discharges and lay-offs violate the collective bargaining agreement. In many such cases employees are reinstated with "back pay" or are given back pay for the period of their lay off. If the test sought to be applied by appellant in this case, *i.e.*, that wages require the rendition of services by employees, such test would apply with equal force to the foregoing cases. Yet, so far as we have been able to ascertain, it is the practice of employers to treat such back pay as wages and so report to the Internal Revenue Bureau and Social Security Board. If such payments are to be finally held not to be wages and the Board records corrected accordingly, it will place an administrative burden on employers, the Internal Revenue Bureau and the Social Security Board far in excess of the administrative difficulties involved in crediting "back pay" in National Labor Relations Board cases as wages under the Social Security Act.

(b) It is quite probable that there will be instances in which veterans will be awarded back pay for periods during which they are denied reemployment by their former employer in violation of the Selective Training and Service Act. It would seem that the determination of the instant case will also determine the right of such veterans to protection under the Social Security Act.

In the further proceeding to clarify the decree of the Supreme Court in the *Republic Steel* case, *supra*, the Third Circuit held that the reinstated employees were entitled to the benefits of the vacation plan. In *Republic Steel Corp. v. N.L.R.B.*, *supra*, the court said:

> "The striking employees were ordered by the Board and by this Court to be reinstated 'without prejudice to their seniority or other rights or privileges.' We think it was the intention of the Board, as it was of this Court, to provide that *upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work.* It follows that the reinstated strikers are entitled to the benefits of Republic's vacation plan for the year in which they are reinstated and all subsequent years *upon a basis of continuity of service computed as though they had been actually at work during the entire period* from May 25, 1937, to the date of reinstatement. Thus an employee who had continuous service with Republic for twelve years prior to May 1, 1937, and who went out on strike in that month and was reinstated in January, 1940, would be entitled in 1940 to the vacation of 10 days granted by the vacation plan to employees having 15 years continuous service." (Italics supplied.)

In the present case, under the decision of the Social Security Board and of the Court below, an employee who has been illegally discharged by an employer and who has been ordered reinstated with back pay by an order of the National Labor Relations Board, will have lost rights and benefits to which he would have been entitled had he not been illegally discharged by his employer. He will have lost wage credits on his social security account which may affect his or his family's benefit rights under the Social Security Act. In some cases it may well determine whether an employee or his family are entitled to any

benefits whatsoever. Indeed several of the Ford employees, who received back pay along with plaintiff, will lose all rights to old age benefits, and several widows of deceased Ford employees will likewise lose all right to survivor's benefits, if the present ruling stands.

It was the obvious intention of Congress, in the National Labor Relations Act, to reinstate such employees "without prejudice to their seniority or other rights or privileges." But the interpretation adopted by the Social Security Board and the Court below would make impossible the effectuation of such a policy. Likewise it was the intention of Congress, in the Social Security Act, to give social security protection to workers in industry. But the present ruling would eliminate such protection from a substantial group of these workers. An interpretation at such variance with clearly expressed congressional objectives should be avoided if possible.

We have already pointed out that under a reasonable and proper interpretation of the Social Security Act "back pay" constitutes "wages." In these circumstances the Court should construe the Social Security Act so as to effectuate a policy which will be consistent with the congressional policy set forth in that act and in the National Labor Relations Act.

In the case of *N.L.R.B. v. Killoren, Trustee, supra,* the Court approached the problem of interpreting the Bankruptcy Act by seeking to achieve an interpretation which, if possible, would make consistent the policies of Congress as set forth in both the Bankruptcy Act and the National Labor Relations Act. The Court's approach to this problem is indicated in the following language:

> "We are of the opinion that a back pay allowance should accordingly be treated the same as any regu-

lar wage claim, for bankruptcy purposes, unless we are prevented from doing so by the provisions of the Bankruptcy Act."

* * * * *

"And so, public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it."

A similar approach to the interpretation of the two laws here involved will effect a result similar to that arrived at in the *Killoren* case.

The congressional intention to consider back pay as wages for tax purpose was emphasized only a year ago. Under the decision in the *Manseau* case, *supra*, a discriminatorily discharged employee who received back pay was required to pay income tax on the entire amount received at the tax rate in effect during the year in which the money was paid to him. In order to remedy this injustice Congress adopted an amendment to the Internal Revenue Code (Sec. 119 of the Revenue Act of 1943 amending Section 107 of the Internal Revenue Code by adding subsection (d)) under which the employee could allocate his back pay (with the exception of amounts too small to warrant administrative inconvenience) over the period of his discharge and file amended returns including the back pay as income for the years he would have received it, had he not been discharged.

By this amendment Congress clearly evidenced its intention of effectuating the purposes of the National Labor Relations Act by placing the employee, for tax purposes, in exactly the position he would have been, had he not been illegally discharged. In doing so, Congress treated back pay under the National Labor Relations Act as wages actually or constructively earned by the employee during the period of his discharge. This recent congres-

sional action, disclosing an intention to treat back pay as wages for the purpose of effectuating the objectives of the Income Tax Laws and the National Labor Relations Act, is persuasive evidence that Congress likewise intended that back pay should be treated as wages in order to conform the objectives of the National Labor Relations Act with the Social Security Act.

In determining the meaning of the terms "employment" and "wages" under the Social Security Act it is important to note that the objective of the statute is not to deal directly with employment and wages as such, but only as a means of achieving the objective of providing social security in the public interest. This point is well made by Mr. Fooner in his article in the Michigan Law Review, *supra*, as follows:

> "While the statute thus defines 'employment' and 'wages' it must be recognized that the determination of what constitutes employment and wages does not purport to be an objective of the program. Quite otherwise, the purpose of the legislation is 'to provide for the general welfare' and 'to raise revenue' and, more specifically, '* * * of providing security for certain groups of the population, against the economic hazards resulting from old age and death.'"

Underlying the *Killoren* decision is the sound principle that the policy of the United States laid down in the National Labor Relations Act would be frustrated if full enforcement of a back pay award were denied in another federal statute dealing with bankruptcy and wage claims thereunder.

In the same way the present ruling of the Social Security Board and the Court below excludes back pay awards from the provisions of the Social Security Act,

particularly its tax provisions, and creates an inconsistent policy between two federal statutes and nullifies the purposes of both. The far-reaching social reforms adopted by the 74th Congress constituted, as a whole, a comprehensive interrelated program to provide security and protection for American workers. If congressional intention is to be effectuated, each part of the program should be construed, if possible, to harmonize with the objectives of the remainder. It would indeed be anomalous that an employer by virtue of the action of the federal government, may not deny an employee any incident of the employment relationship through the commission of an unfair labor practice, but that the federal government may do so.

Social security benefits are an incident of the employment relationship. The National Labor Relations Act states that none of these incidents of employment shall be lost to an employee. The appellant contends that an employee's period of employment should be interrupted, for the purposes of social security, during the period that he is denied work by his employer in the commission of an unfair labor practice.

Since neither the literal language of the statute nor the substance of the subject matter in question compels this result, it is without any foundation. We submit that the decision of the Circuit Court of Appeals for the Sixth Circuit is correct and should be affirmed.

Respectfully submitted,

ERNEST GOODMAN,
MORTON A. EDEN,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1945.

The Social Security Board, Petitioner, *vs.* Joseph Nierotko.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 25, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

A problem as to whether "back pay," which is granted to an employee under the National Labor Relations Act, shall be treated as "wages" under the Social Security Act comes before us on this record. If such "back pay" is a wage payment, there is also at issue the proper allocation of such sums to the quarters of coverage for which the "back pay" was allowed.

The respondent, Joseph Nierotko, was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company, and was reinstated by that Board in his employment with directions for "back pay" for the period February 2, 1937, to September 25, 1939.[1] The "back pay" was paid by the employer on July 18, 1941. Thereafter Nierotko requested the Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board.[2] In conformity with its minute of formal general action of March 27, 1942, the Board refused to credit Nierotko's "back pay" as wages. On review of the Board's decision,[3] the District Court upheld the Board. The Circuit Court of Appeals reversed. — F. 2d —. On account of the importance of the issues in the administration of the Social Security Act, we granted certiorari.[4] — U. S. —; Judicial Code § 240.

[1] N. L. R. A., Sec. 10(c), 49 Stat. 454.

[2] Social Security Act, Sec. 205(c)(3), 53 Stat. 1369.

[3] Sec. 205(g).

[4] The briefs of the Government advise us that more than thirty thousand individual employees were allowed "back pay" in "closed" cases by the National Labor Relations Board under Sec. 10(c), 49 Stat. 454, in the period 1939-1945. See Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 187, *Second*. The aggregate in money exceeded $7,700,000 in the fiscal years 1939 to 1944 as shown by the reports of the N. L. R. B. for those years.

During the period for which "back pay" was awarded respondent the Federal Old Age benefits were governed by Title II of the Social Security Act of 1935. 49 Stat. 622. As Title II of the Social Security Act Amendments of 1939 became effective January 1, 1940 (53 Stat. 1362), the actual payment of the "back wages" occurred thereafter. In our view the governing provisions which determine whether this "back pay" is wages are those of the earlier enactment.[5]

Wages are the basis for the administration of Federal Old Age Benefits. 49 Stat. 622. Only those who earn wages are eligible for benefits.[6] The periods of time during which wages are earned are important and may be crucial on eligibility under either the original act or the Amendments of 1939. See sec.

[5] By the foregoing statement it is not intended to imply that the variations in the definitions of wages between the two enactments are significant on the issues herein considered. Sec. 299 (b) of the Amendment recognizes possible differences in the meaning of employment: "(b) the term 'employment' means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him . . ."

[6] "Sec. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

"(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than $3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than $3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of $3,000; plus

(B) One-Twelfth of 1 per centum of the amount by which such total wages exceeded $3,000 and did not exceed $45,000; plus

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded $45,000."

Sec. 210. "(c) The term 'qualified individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than $2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year."

210 (c) and compare sec. 209 (g), 53 Stat. 1376.[7] The benefits are financed by payments from employees and employers which are calculated on wages.[8] The Act defines "wages" for Old Age benefits as follows:

> "SEC. 210. When used in this title—
>
> "(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash. . . ."

Employment is defined thus:

> "(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except . . ."

The tax titles of the Social Security Act have identical definitions of wages and employment.[9] An employee under the Social Security Act is not specifically defined but the individual to whom the Act's benefits are to be paid is one receiving "wages" for "employment" in accordance with § 210 (c) and employment is service by an "employee" to an "employer." Obviously a sharply

---

[7] Sec. 209. "(g) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

"(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage, or

"(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (b) of this section, the term 'quarter' and the term 'calendar quarter' mean a period of three calendar months ending on March 31, June 30, September 30, or December 31, and the term 'quarter of coverage' means a calendar quarter in which the individual has been paid not less than $50 in wages."

[8] 49 Stat. 636-37:

"Section 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

"(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

"Sec. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

"(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

[9] Sections 811 (a) and (b), and 907 (b) and (c).

defined line between payments to employees which are wages and which are not is essential to proper administration.[10]

Under the National Labor Relations Act an employee is described as "any individual whose work has ceased . . . because of any unfair labor practice." Sec. 2(3), 49 Stat. 450. The enforcement provisions of this Act under which Nierotko received his "back pay" allow the Labor Board to reinstate "employees with or without back pay." Sec. 10(c). The purpose of the "back pay" allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace.[11]

The purpose of the Federal Old Age Benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor.[12] Eligibility for these benefits and the amount depends upon the total wages which the employee has received and the periods in which wages were paid.[13] While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves do not specifically deal with whether or not "back pay" under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual, who is an employee under the Labor Act and who receives "back pay" for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as "remuneration for employment" and employment as "any service . . . performed . . . by an employee for his employer."

---

[10] Provisions similar to those quoted are found in the Social Security Act Amendments of 1939. See sections 202(a), 202(e), 203(d), 209(a), (b), (e), (g), (h), and 601, 604, and 606 at 53 Stat. 1362 *et seq.*

[11] 49 Stat. 449.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[12] See Helvering *v.* Davis, 301 U. S. 619, 641; H. Rep. No. 728, 76th Cong., 1st Sess., 3-4; S. Rep. No. 734, 76th Cong., 1st Sess., 3-4.

[13] Under the Social Security Act of 1935, see sec. 202(a) and sec. 210(b) *supra*, note 6. Under the 1939 Amendments, see sec. 202 and 209(e), (f) and (g), 53 Stat. 1363, *et seq.*

Surely the "back pay" is "remuneration." Under Section 10(c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices (section 8) and to protect the right of employees to self-organization which is declared by section 7.[14] It is also true that in requiring reparation to the employee through "back pay" that reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. "Back-pay" is not a fine or penalty imposed upon the employer by the Board. Reinstatement and "back pay" are for the "protection of the employees and the redress of their grievances" to make them "whole." *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 11, 12. "... a worker's loss in wages and in general working conditions must be made whole." *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 196. "A worker is not given 'back pay' by the Board equal to what he would have earned with the employer but for the unlawful discharge but is given that sum less any net earnings during the time between discharge and reinstatement."[15]

Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need further only consider whether under the Social Security Act its definition of employment, as "any service . . . performed . . . by an employee for his employer," covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done."[16] We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but

[14] Virginia Electric Co. v. Labor Board, 319 U. S. 533, 543.

[15] Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 196, 198. See Third Annual Report, National Labor Relations Board, 202; p. 41; Eighth Annual Report, 41; Ninth Annual Report 49. Nierotko's order was in this form. 14 N. L. R. B. 346, 410.

[16] H. Rep. No. 615, 74th Cong., 1st Sess., pp. 6, 21, 32, and S. Rep. No. 628, 74th Cong., 1st Sess., pp. 7, 32.

the entire employer-employee relationship for which compensation is paid to the employee by the employer.[17]

An argument against the interpretation which we give to "service performed" is the contrary ruling of the governmental agencies which are charged with the administration of the Social Security Act. Their competence and experience in this field command us to reflect before we decide contrary to their conclusion. The first administrative determination was apparently made in 1939 by an Office Decision of the Bureau of Internal Revenue on the problem of whether "back pay" under a Labor Board order was wages subject to tax under Titles VIII and IX of the Social Security Act which the Bureau collects.[18] The back pay was held not to be subject as wages to the tax because no service was performed, the employer had tried to terminate the employment relationship and the allowance of back pay was discretionary with the Labor Board. Reliance for the conclusions was placed upon *Aguilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146;

[17] For example the Social Security Board's Regulations No. 3 in considering "wages" treats vacation allowances as wages. 26 CFR, 1940 Supp., 402.227(b).

Compare Armour & Co. v. Wantock, 323 U. S. 126, 133.

Treasury Department Regulations No. 91 relating to the Employees' Tax and the Employer's Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay, as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay.

I. R. B., 1940, 1-22-10271, S. S. T. 389, an Office Decision, holds that amounts paid employees during absence on jury service to make their pay equivalent to regular salary are wages.

Though formal action was taken by the Social Security Board on March 27, 1942, our attention has not been called to any regulation of any governmental agency excluding "back pay" from wages. The Treasury Department has authority to issue regulations for Social Security taxes. Secs. 808 and 908, 49 Stat. 638, *et seq.*; I. R. C., Sec. 1429, 53 Stat. 178. So has the Social Security Board, sec. 1102, 49 Stat. 647, and sec. 205(a), 53 Stat. 1368. All authority for the promulgation of regulations limits the action to rules and regulations not inconsistent with the provisions of the various sections.

In regulations governing the collection of income taxes at source on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

(a) Wages. The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—" See 26 CFR, 1944 Supp., 405.101(d) and (e).

[18] I. R. B., 1939, 14-9776, S. S. T. 359. No regulations covering "back pay" under the Social Security Act have been found. They are authorized by §§ 808 and 908, 49 Stat. 638, 643.

which had held "back pay" a public reparation order and therefore not triable by jury as a private right for wages would have been. This position is maintained by the Social Security Board by minute of March 27, 1942. It is followed by the National Labor Relations Board which at one time approved the retention by the employer of the tax on the employees' back pay for transmission to the Treasury Department as a tax on wages and later reversed its position on the authority of the Office Decision to which reference has just been made. *Re Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 53(5), 54, 58.[19]

The Office Decision seems to us unsound. The portion of the *Aquilines* decision, which the Office Decision relied upon, was directed at the constitutional claim to a right of trial by jury. It stated that "back pay" was not a penalty or damages which a private individual might claim. But there is nothing in the opinion which supports the idea that the "back pay" award differs from other pay. Indeed the opinion said that "Congress has the right to eradicate them [unfair practices] from the beginning." 87 F. 2d at 151, l. c. We think the true relation of awards of "back pay" to compensation appears in the *Republic Steel* and *Phelps-Dodge* cases, hereinbefore discussed.[20]

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the administrative decision should be treated as conclusive, and reliance for that argument is placed upon *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130, and *Gray* v. *Powell*, 314 U. S. 402, 411. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive.[21] The validity of regulations is specifically reserved for

[19] The states have largely followed the Bureau of Internal Revenue in their classification of "back pay." Some have disagreed. Unemployment Insurance Service, All State Treatise, C. C. H., Paragraph 1201. See Robins Dry Dock v. Tonra, 258 App. Div. 835, 283 N. Y. 676.

[20] This is the view of the Eighth Circuit when a "back pay" claim was presented in bankruptcy. N. L. R. B. v. Killoren, 122 F. 2d 609, 614.

[21] National Labor Relations Act, 49 Stat. 454, sec. 10(e); Bituminous Coal Act of 1937, 50 Stat. 72, 85, sec. 4-A; Social Security Act Amendments of 1939, secs. 205(g)(3) and (g).

judicial determination by the Social Security Act Amendments of 1939, sec. 205(g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages and their expert judgment is entitled, as we have said, to great weight.[22] The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both *Hearst Publications*, p. 131, and *Gray* v. *Powell*, p. 411, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function.[23] Congress used a well understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act pay-

[22] See Sanford v. Comm'r, 308 U. S. 39, 52; Skidmore v. Swift & Co., 323 U. S. 134, 139-40.

[23] School of Magnet Healing v. McAnnulty, 187 U. S. 94, 110; International Ry. Co. v. Davidson, 257 U. S. 506, 514; Iselin, v. United States, 270 U. S. 245; Koshland v. Helvering, 298 U. S. 441; Federal Comm'n v. Broadcasting Co., 309 U. S. 134, 144-145; United States v. Carolina Carriers Corp., 315 U. S. 475, 489; Helvering v. Credit Alliance Co., 316 U. S. 107, 112; Helvering v. Sabine Trans. Co., 318 U. S. 306, 311-12; Addison v. Holly Hill Co., 322 U. S. 607, 611, *et seq.*; cf. Stewart & Bro. v. Bowles, 322 U. S. 398, 403.

ments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.

Petitioner further questions the validity of the decision of the Circuit Court of Appeals on the ground that it must be inferred from the opinion that the "back pay" must be allocated as wages by the Board to the "calendar quarters" of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct.[24] This conclusion, petitioner argues, tends to show that "back pay" cannot be wages because the Amendments of 1939 use "quarters" as the basis for eligibility as well as the measure of benefits and require "wages" to be "paid" in certain quarters.[25]

If, as we have held above, "back pay" is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve but we do not believe they are insuperable.[26]

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

---

[24] See Nierotka v. Social Security Board, 149 F. 2d 273, 274, r. c.

[25] See note 7, *supra*. The same problem would arise under the Social Security Act; 49 Stat. 625, sec. 210(c).

[26] The Social Security Board itself has recommended the inclusion of "back pay" in wages. Annual Report of the Federal Security Agency, Social Security Board (1945), sec. 5, p. 38:

"Certain types of income which are now not considered 'wages' under the definition in the act, should be included as wages, so that the base for benefits would represent the worker's actual remuneration from employment. These include tips, dismissal payments which the employer is not legally required to make but nevertheless does make, and payments made under orders of the National Labor Relations Board or a similar State board."

A pending bill, S. 1050, 79th Cong., 1st Sess., Part F, sec. 275, makes provision for the inclusion in wages under the Social Security Act of sums paid pursuant to the National Labor Relations Act.

"Back pay" is now treated distributively under the Internal Revenue Code. Sec. 119, Revenue Act of 1943, 53 Stat. 39.

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1945.

The Social Security Board, Petitioner, vs. Joseph Nierotko	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 25, 1946.]

Mr. Justice Frankfurter concurring.

The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another though he be inactive. *E. g., Armour & Co.* v. *Wantock*, 323 U. S. 126. This is, practically speaking, the ordinary situation of employment in a "standb-by" capacity. *United States* v. *Local 807*, 315 U. S. 521, 535. "The basis of a back-pay order under the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, is precisely that. When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time. *Phelps Dodge Corp.* v. *Board*, 313 U. S. 177. In short, an employer must pay wages although, in violation of law, he has subjected his employee to enforced idleness. Since such compensation is in fact paid as wages, it is a plain disregard of the law for the Social Security Board not to include such payments among the employees' wages. Neither the terms of the Social Security Act, 49 Stat. 620, 53 Stat. 1360, 42 U. S. C. § 301, nor the implications of policy, comparable to some aspects of the Railway Labor Act, 44 Stat. 477, 48 Stat. 926, 48 Stat. 1185, 49 Stat. 1921, 54 Stat. 758, 46 U. S. C. § 151, give the Board judicially unreviewable authority to exclude from wages what as a matter of law are wages. And so I concur in the decision of the Court.